TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1936

No. 668

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LEED SUTHERLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1936
CERTIORARI GRANTED NOVEMBER 23, 1936

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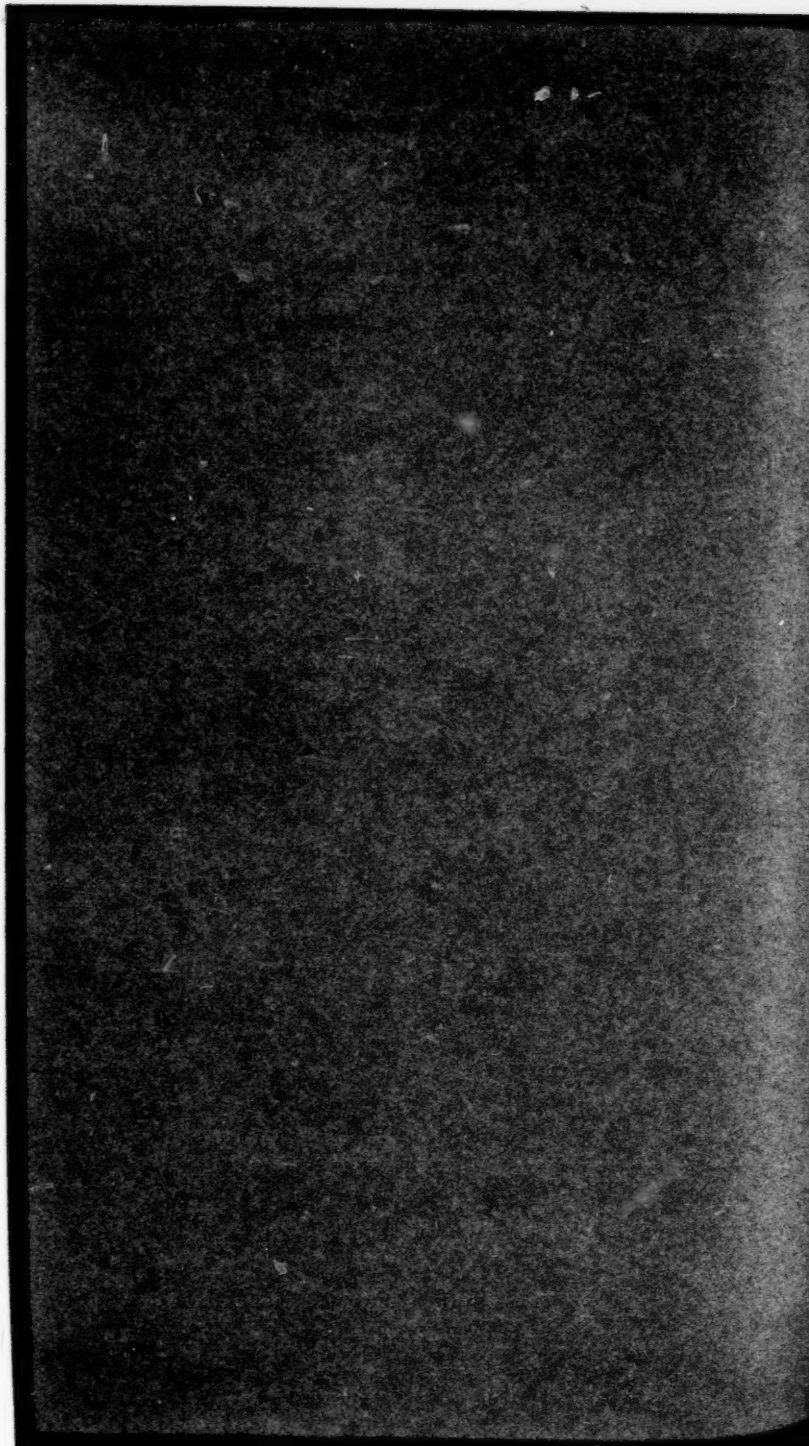

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LEIB RITTERMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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A In United States District Court, District of Vermont

Writ of error

Filed Apr. 5, 1926

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the District of Vermont, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, between the United States of America, plaintiff, and Leib Ritterman, defendant, a manifest error hath happened, to the great damage of the said Leib Ritterman, as is said and appears by his complaint, I being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 22d day of April, 1926, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, this 23 day of March, in the year of our Lord one thousand nine hundred and twenty six, and of the independence of the United States the one hundred and forty ninth year.

[SEAL.] WM. PARKIN,
Clerk of the Circuit Court of Appeals for the Second Circuit.

The foregoing writ is hereby allowed.

HENRY WADE ROGERS,
U. S. Circuit Judge.

B In United States District Court

Bill of indictment

Filed Feb. 24, 1926

UNITED STATES OF AMERICA,
District of Vermont, ss:

In the District Court of the United States, within and for the District of Vermont aforesaid, at the February term thereof, A. D. 1926.

The grand jurors of the United States, for and within said district, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present that:

Count 3. Leib Ritterman of Antwerp, Belgium, on, to wit, the 28th day of January, A. D. 1926, at the towns of Highgate and Swanton, and at the city of Saint Albans, all in the county of Franklin, State and judicial district of Vermont, and within the jurisdiction of this court, did then and there unlawfully, willfully, knowingly, and feloniously, wit hintent to evade payment to the United States of America of certain duties on certain merchandise, to wit, one thousand and twenty-two and eighty-five hundredths (1,022.85) carats of unset cut diamonds, of great value, to wit, one hundred twenty two thousand four hundred ninety two dollars and forty three cents ($122,492.43) contained in one leather Gladstone bag subject to the payment of duties to said United States, and thereby defraud said United States and the revenue thereof, smuggle and clandestinely introduce into said United States from
C a foreign country, to wit, the Dominion of Canada, said merchandise, consisting of said one thousand twenty two and eighty five hundredths (1,022.85) carats of unset cut diamonds, without making any declaration to any customs office of said United States, or to any customs officer of said United States, to enter said diamonds into said United States, and without causing said diamonds to be invoiced for the purpose of ascertaining the duties on said merchandise, consisting of said diamonds, at any customs office of said United States, or by any customs officer of said United States, and without paying or accounting for the duties to which said merchandise, consisting of said diamonds, was then and there subject, although said Leib Ritterman had an opportunity to do so, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

D [File endorsement omitted.]

E In United States District Court

UNITED STATES vs. LEIB RITTERMAN	Criminal docket No. 1715

Docket entries

Feb. 24, 1926 Filed indictment for violation of section 593 of the Tariff Act.
" 26, " " precipe for U. S. witnesses.
" " " Issued two subpoenas therefor
Mar 1, " Filed one subpoena, returned served.
" 3, " " appearance of Albert Mac C. Barnes, Esq., for defendant

" 3, " Defendant in court with his attorney, A Mac C. Barnes, Esq.: hearing on defendant's motion to reduce bail.

" 3, " Ordered that bail be reduced and fixed in the sum of twelve thousand five hundred dollars.

" 3, " Filed recognizance of Leib Ritterman, principal, and Equitable Surety Company, surety, in the sum of five thousand dollers.

" 3, " Leib Ritterman, principal, and J. H. Dugan, surety, appeared in open court and entered into a recognizance in the sum of seven thousand five hundred dollars, conditioned for appearance of defendant March 10, 1926.

" 3, " Appearance of W. R. McFeeters, Esq., was entered for defendant.

" 10, " United States attorney and Asst. U. S. attorney appearing for the Government: Albert Mac C. Barnes, Esq., and D. W. Steele, Esq., appearing for defendant. Hearing is had on defendant's special demurrer to court two.

" " " Ordered that demurrer be overruled. Defendant was arraigned and pleaded not guilty. The following jury was impaneled and sworn by the clerk:

G. W. Bowen, William Hine, Herbert Cummings, Ray Collins, Rufus J. Perkins, Thomas McKenzie, A. M. Hall, R. C. Mace, C. M. Joslyn, J. C. Hartwell, Leon E. Cooley, Charles Austin.

" " " " that G. W. Bowen be appointed foreman.

" " " " Defendant moves that the Government be ordered to make an election of counts.

" " " " that defendant's motion be denied.

F Assistant U. S. attorney makes opening statement to the jury for the Government.

Mar. 10, 1926 The following witnesses were sworn by the clerk: E. M. Wright, G. E. Bingham, M. D. Armstrong, Willis E. Fuller, C. L. Orton, Maurice Walsh, J. B. Kendricks, J. J. Flynn.

" " " Defendant moves that the witnesses be excluded from the court room during the taking of testimony.

" " " Ordered that defendant's motion be granted.

" " " The following witnesses were examined by assistant U. S. attorney and cross-examined by Mr. Barnes: E. M. Wright, Willis E. Fuller, J. B. Kendricks, G. E. Bingham, J. J. Flynn, H. C. Whitehill, Maurice Walsh.

Mr. Flynn was recalled and further examined and cross-examined.

Mr. Bingham was recalled and further examined for the Government.

C. E. Sawyer was sworn by clerk and examined by assistant U. S. attorney.

Charles L. Orton was examined by the assistant U. S. attorney and cross-examined by Mr. Barnes. M. D. Armstrong was examined by assistant U. S. attorney. E. R. Harvey was sworn by clerk, examined by assistant U. S. attorney, and cross-examined by Mr. Barnes.

" " " Government rests. Defendant rests. Further trial postponed.

" 11, " Mr. Barnes moves that the court direct a verdict of not guilty for defendant.

" " " Ordered that defendant's motion be denied.

" " " " " Government have leave to withdraw its rest. Rest withdrawn. W. R. H. Davidson sworn by clerk, examined by assistant U. S. attorney, and cross-examined by Mr. Barnes.

" " " The court withdraws counts 1, 2, 4, 5, 6, 7, & 8 of the indictment from the consideration of the jury.

" " " Mr. Barnes moves that the court direct a verdict of not guilty for defendant.

" " " Ordered that defendant's motion be denied.

" " " Assistant U. S. attorney makes opening argument to jury, followed by Mr. Barnes. Mr. Steele argues to jury for defendant. United States attorney makes closing argument to jury for Government.

A. W. Harvey and H. C. Lawson were each sworn by the clerk as officers in charge of jury impaneled to try criminal cases.

" Mar. 11, 1926. At 11.30 in the forenoon the court begins its charge to the jury, concluding at 11.45 o'clock, when the jury retire to consider the case.

Mar. 11, 1926 Ordered that the marshal provide meals for the jury and officers in charge of jury during the consideration of the case.

At 2 o'clock in the afternoon the jury come into court and report a verdict of guilty.

" " " Defendant moves that verdict be set aside, and in arrest of judgment.

" " " Ordered that defendant's motion be denied.

" " " " " judgment of guilty be entered on verdict of guilty.

United States attorney moves for sentence.

" " " Ordered that defendant be sentenced to be imprisoned in the United States penitentiary at Atlanta, in the county of Fulton and State of Georgia, for the term of one year and one day from and after the eleventh day of March, 1926, the date of sentence, and to stand committed until sentence be complied with.

" " " " that mittimus issue.

" " " Issued mittimus.

" 17, " Filed U. S. subpoena, returned served.

" 19, " " motion to be allowed to furnish bail pending appeal and order thereon.

" " " Ordered that defendant's written motion that defendant be admitted to bail be denied.

Apr. 5, 1926 Filed assignment of errors, with service accepted.

" " " " petition for writ of error and order allowing writ of error, signed by Henry Wade Rogers, United States Circuit Judge, with service accepted.

" " " " writ of error signed by William Parkin, clerk, Circuit Court of Appeals, returned with service accepted.

" " " " citation signed by Judge Rogers returnable April 22, 1926 with service accepted.

" 14, 1926 " bill of exceptions.

H [Clerk's certificate to foregoing paper omitted in printing.]

1 In United States District Court

Bill of exceptions

[Title omitted.]

Filed April 14, 1926.

Trial by jury at Burlington, Vt., March 10, 11, 1926.
Before Hon. H. J.
[Appearances of counsel omitted in printing.]

2 *Colloquy between court and counsel*

9 A. M., March 10, 1926.

BARNES. If your honor please, before the plea is taken, I would like to interpose a demurrer to one count of the indictment, and, I believe, under the practice it is proper to introduce that before the plea.

COURT. Have you spoken to the district attorney?

BARNES. No, sir.

COURT. Pass up the indictment, please. Which count is it?

BARNES. The 2nd.

COURT. Now what is the ground of the demurrer?

BARNES. Count 2 of the indictment charges the crime of smuggling, and also charges the crime of unlawfully importing. In our opinion the crimes are separate and distinct and are improperly included in one count.

COURT. Two offences. Read your demurrer, please.

BARNES. (Reads demurrer as follows:)

Demurrer to indictment

Now comes the defendant by his attorneys and specially demurs to the second count of the indictment found by the grand juror of the United States for the said district, and respectfully shows and alleges: First, that "smuggling or clandestinely introducing" merchandise into the United States is a crime prohibited by section 593a of the tariff act of 1922; second, that "unlawful importation" of merchandise into the United States is a crime prohibited
4 by section 593b of the tariff act of 1922; that count 2 in the indictment heretofore found by the grand jurors of this district contains the allegation that the said Leib Ritterman did "smuggle, import, and bring into said United States contrary to law, etc.," thereby alleging two distinct and separate crimes prohibited by two separate provisions of the tariff act of 1922, and carrying two separate penalties; that is, fine and imprisonment for the crime of smuggling, and fine, imprisonment, and the forfeiture of the merchandise for the crime of unlawful importation.

Wherefore defendant prays that count 2 of the said indictment be quashed and for such other relief as to this honorable court shall seem just.

Colloquy between court and counsel

BARNES. The phraseology of section 593a is, "If any person knowingly and wilfully, with intent to defraud the revenue of the United States, smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out, or passes or attempts to pass through the custom house any false, forged, or fraudulent invoice, every such person, his or her or their aiders or abettors shall be deemed guilty of a misdemeanor, etc.," which paragraph or section b of the same section states: "If any person fraudulently or knowingly imports or brings into the United States or assists in so doing, any merchandise contrary to law, etc." These two crimes have always been considered separate and distinct, and decisions thereunder arising mostly under section 2865 of the Revised Statutes, covering the crime of smuggling, and section 3082 of the Revised Statutes, covering the crime of unlawful importation.

Now, the penalties are different, the degree of proof——

5 COURT. What is the difference in the penalties?

BARNES. The penalty in one case is fine and imprisonment; in the other case is fine, imprisonment, and forfeiture of the goods. The degree of proof is different, it having been held in a number of cases that a prosecution for forfeiture under section 3082 did not require the same degree of proof as the criminal indictment under section 2865.

COURT. But under the other section—is that fine, imprisonment, and forfeiture, or only forfeiture?

BARNES. No, sir; it is fine, imprisonment, and forfeiture. Section 3082 of the Revised Statutes is almost identical with 593 of the tariff act of 1922. It seems to have been copied from 3082, that section of the Revised Statutes having provided, "Selling or buying goods liable to seizure," that is, the heading of it says, "If any person shall fraudulently or knowingly import or bring into the United States or assist in so doing"; then it follows, with the exception of three words, the exact phraseology used in the tariff act of 1922, those three words being "imported or brought in," which have been added to that law. Otherwise it is identical.

AMEY. Just a word, if your honor please, on that. Now this about which he complains is, as I understand it, that we have covered 454la and 4541b in the same count of the indictment. The language he sets forth here is that the said "Leib Ritterman"—and he quotes from the indictment—"did smuggle and import and bring into the United States contrary to law." Now subsection b of 4541 says, "If any person fraudulently or knowingly imports or brings into the United States merchandise," etc., leaving out the word "smuggle." Now the word "smuggle," if that is an extraneous word and not required in that kind of an indictment, it may well be rejected, because there is enough in there to constitute the offense under subsection b without taking that into consideration.

COURT. What is the difference in those two sections as to the offenses?

6 AMEY. I have always thought that they had practically the same meaning, except that in subsection b would apply to the merchandise the importation of which is prohibited; that is the way I have always considered it. Now that may not be true; I don't know the dictionary definition now exactly of the word "smuggle." I suppose that "smuggle" means to import unlawfully. It means to import unlawfully, it means practically the same as to import. In other words, they are synonymous.

COURT. What is the necessity of the second count in this indictment, anyway?

AMEY. My Bro. Martin will have to answer that; he drew it and is very familiar with every count in the indictment.

COURT. Here is a very long indictment, containing eight counts. Of course it is good pleading to state the case in a variety of ways. But what is the particular advantage of having count 2?

MARTIN. If it please your honor, count 1 is drawn under section a of the section referred to; count 2 under subdivision b, and count 3 is

like count 1 in a little different language; count 4 is like count 2 in a little different language.

COURT. What is the advantage of count 2?

MARTIN. There really isn't any advantage, your honor, for the reason that count 4 is practically the same, that is, drawn on the same subdivision, a trifle different language; I don't think there is any material difference.

COURT. Well, we are just ready to try the case, and it will take some time to go through all these requirements. In this case you intend to try the defendant for smuggling the diamonds. I will overrule the demurrer and sustain the second count, subject to the defendant's exception. I will treat this ruling as a temporary ruling. When I have some time to give it attention, this noon, I will look it over. I haven't any time now to take all these things and analyze them carefully. My notion is that this does not state two offenses. The allegation is that "intending to evade the payment of duties, did smuggle and import and bring into the United States these diamonds contrary to law."

BARNES. May I call your honor's attention to a recent case in which Judge Hand at New York has passed upon a somewhat similar question, although it is not directly in point. In the case of United States v. One Blue Taffeta Evening Cloak, reported in the 287 Fed. Rep. at page 703, Judge Hand said: "The smuggling count is alleged because in other counts the United States has alleged the goods were disclosed to the authorities, but the objection amounts to no more than a charge of inconsistency between counts. Revised Statutes 3082 only forbids importation, and section 3 only affects entry, and the claimants argue that entry succeeds and is not a part of importation. Importation is complete, certainly, for purposes of the incidence of duties as soon as the goods enter the port." After a reasoning collateral to the main issue he said: "Besides, I do not see how the word 'import' can mean different things in the same connection."

Our contention here of course is that any importation made—and I presume this will be the contention of the district attorney—any importation made in contravention of any statute in effect at the time of the commission of the offense is fully covered by the penalties provided for in paragraph b of section 593 of the tariff act of 1922, but that the first part of that paragraph defines a crime which has been so well defined by judicial authority that there can be no possible question about what it means. "Smuggle" is now as it always has been just one thing, and the definition of smuggling has been to a large extent included in the paragraph itself, but to confuse a charge of smuggling with a charge of unlawful importation, which may be for any one of fifty reasons, is to put the defendant on defense, which is distinctly beyond the right which the grand jury has in bringing such indictment in regard to the breadth of preparation necessary to meet any one of fifty possible charges or to meet only one.

COURT. I will let this stand as I suggested, and this noon or this evening I will give it more attention.

(Exception by defendant.)

Plea of not guilty

Defendant arraigned; plea of not guilty.
Jury impaneled.

Motion to elect counts

BARNES. If the court please, we respectfully move that the court compel the prosecution to an election of counts in this indictment under which they will proceed.

Count No. 1 charges the elements, or most of the elements, of the crime of smuggling, as set forth in section 593a of the tariff act of 1922. It also contains the statement, "without making any declaration to any customs officer or at any customs office, did enter, without causing such merchandise to be invoiced by any such officer, without paying or accounting for the duties."

Count 2, except for the use of the word "smuggle," seems to be confined to section 593b of the tariff act of 1922. Also in that count the insertion of the word "smuggle," as was called to the court's atention in our demurrer, states, as we believe, two crimes, the charge of two crimes in that count.

Count No. 3 charges the crime which we know as smuggling, which is included in 593a. It also sets forth the elements of other crimes or other infractions of the statutes.

Counts 4, 5, 6, 7, and 8 all set forth approximately 20 so-called offenses, or rather about 20 allegations without setting forth under what provision of law or even under what law the allegations are alleged. It would be idle for me to contend before this court that I did not know what this charge was about because section 593a and b cover substantially all there is to any case involving the charge of either smuggling or unlawful importation; but when the Government departs from those two sections and charges things, as is stated in most of these counts, that he did contrary to law, and does not set forth the law to which, it is presumed, the charges alleges the defendant to have acted, it makes of the indictment a thing totally different from what courts have always ruled it should be; that is, that it must be a paper in which the crime must be charged with precision and certainly, that there should not be any ambiguity about it either in the mind of the defendant or in the mind of the court.

Now it is only necessary to read this indictment to become confused about it. I have had a long experience in customs affairs, both for the Government and beside, and I do not recognize a number of these charges as relating to any law of which I have heard; certainly none that I have seen. The crimes evidently sought to

be charged are just two, smuggling in one count, unlawful importation in another. I think in order to give this indictment such precision of charge or allegation and such—and to avoid ambiguity latent in it as it stands—that the defendant is entitled to an order of election of the counts or the charges upon which the Government will here proceed.

COURT. Isn't the general rule pretty well settled that when an election is to be made that the court won't compel the Government to elect until the close of the Government's case? Unless there is a misjoinder of counts here the court ought not to compel the Government to elect, if at all, until they put in their evidence.

BARNES. But has your honor considered the fact that the minute they begin putting in their evidence they put it in on a certain theory that they have, which under this indictment is concealed from me. The only object of the indictment is to charge the defendant with a specific act, so that he may know, first, how to cross-examine the Government's witnesses; and second, what evidence he must introduce himself.

COURT. The very purpose of more than one count is for the Government to state its case to meet the evidence as it turns out to be. Now unless there is a misjoinder of counts I do not think that the court should require the Government to elect, if at all, until the Government put in its evidence. If it turns out that the evidence is such that the defendant would not have a fair trial, if he is compelled to meet a variety of offenses, why then the court would compel the Government to elect. Now if there is any count here that does not state a good cause of action, does not state an offense, or does not state a violation of the law, why you should have demurred to it; but you don't really need to demur to it; if there is any count here that does not state an offense even after the verdict you can move for an arrest of judgment. So your rights and the rights of your client are going to be taken care of in any event, and I will deny the motion, to which the defendant has an exception. You can bring it up again at the conclusion of the Government's evidence.

(Exception by defendant.)

The following witnesses were called by the Government and sworn:

E. M. Wright.
Willis E. Fuller.
J. B. Kendrick.
G. E. Bingham.
J. J. Flynn.
C. L. Orton.
M. D. Armstrong.
Maurice Walsh.

On request of defendant's attorney all witnesses not testifying excluded from room.

E. M. Wright called by Government.

Direct examination by Mr. Martin:

Q. Your full name, Mr. Wright.

A. Edwin M. Wright.

Q. And where do you live?

A. Montreal, Canada.

Q. And you are an inspector of United States customs?

A. Yes, sir.

Q. And did you see this defendant, Mr. Ritterman, there at the station at Montreal?

A. I did.

Barnes. That is objected to; I move the answer be stricken out pending the ruling on the objection.

11 Court. What is the objection?

Barnes. The objection is, your honor, to testimony relating to anything that happened in connection with this case in Montreal, largely on the ground of the ruling by the Supreme Court in the Keck case that no act done before the obligation to pay constitutes a part of the crime of smuggling, and that particularly is that true where the United States seeks to give an extraterritorial effect to its laws by something which may or may not be required in a foreign country; that so far as this case is concerned and the allegations in the indictment what happened or may have happened in any other country is incompetent, immaterial, and irrelevant; particularly is it incompetent in view of the attitude expressed by the Supreme Court towards this class of actions.

Court. Of course it is true that the defendant can not commit this offense in a foreign country; that is well settled and has been the law of the land always; but this question is, Did he see him in Montreal?

Barnes. Yes; and that is immaterial; that is my point, whether he saw him or not; whether he was there or not has nothing to do with the issue, and that in view of the——

Court. It is necessary of course for the Government to prove that a smuggling occurred. Now he may——

Barnes. Not necessary to that offense, your honor, to show that this man was in Montreal or in Timbuctoo; the offense of smuggling, as the Supreme Court says, is not done or committed until or before the obligation to pay or account for duties arises, even though such act outside and before that time may indicate a further purpose to evade.

Court. Yes; that is true, that is the law. I hardly think an answer to this question would be in any way in conflict with that rule. He saw him in Montreal. Now did he see him when he crossed the line?

12 Barnes. If he saw him when he crossed the line, then it is immaterial whether he saw him in Montreal; might just as well ask him if he saw him in London; it has nothing to do with

this crime, and of course I object here not because of the harm that that one question may cause, but because of the questions which will inevitably follow that, and which if this question is admitted would have to be admitted in their order.

COURT. I will admit that, subject to the defendant's exception.

(Exception by defendant.)

Q. Did you examine any baggage that he had in his possession?

A. I did.

BARNES. That is objected to.

COURT. That may be under the same objection and subject to your exception.

(Exception by defendant.)

BARNES. I make the same objection and on the same grounds.

COURT. Same ruling, and the defendant has an exception.

Q. What time of day was it?

A. Eight p. m.

Q. Is there a train that leaves Montreal for New York, passing through St. Albans, Vermont, about 8.15 in the afternoon?

A. 8.15; yes, sir.

Q. And when you examined that baggage, did you examine all the things that were in it, look inside of them?

BARNES. That is objected to.

COURT. That may be admitted subject to the defendant's objection already made, and under the defendant's exception.

(Exception by defendant.)

A. I examined the clothing and the personal effects inside of the valise.

Q. But you did not examine the inside of these personal effects?

A. No.

Q. And what did you do then, after you examined them?

A. I manifested and sealed the baggage through to St. Albans.

Q. Have you the manifest with you?

A. Yes, sir, I have.

(Manifest marked "Gov. 1.")

Q. I show you a paper marked "Gov. 1" and ask you if that is the manifest?

A. Yes.

Q. And is that the manifest you attached to the bag?

A. Yes, sir.

Q. What kind of a bag was it?

A. It is called a Gladstone bag.

Q. Put any other marks on the bag?

A. I put a chalk mark on; yes, sir.

Q. I show you this bag and ask you if that is the one?

A. It is.

COURT. Shall we called that "Exhibit 2"?

MARTIN. Yes, London bag, "No. 2."

COURT. Gladstone bag.

MARTIN. Gladstone bag, we will say, if your honor please.

Q. When you first saw the bag, was it closed or open?

A. It was open.

14 Q. And you were called to examine it?

BARNES. I object to the leading character of the questions.

COURT. I allow that form of questions here, Mr. Barnes, without I see that harm is done; I rule those in as a matter of discretion, and in fact, I invite counsel to adopt that method.

Q. And was Mr. Ritterman there at the time by the bag?

A. Yes, sir; he was.

Q. Did you have any conversation with him?

A. I did.

Q. What was that conversation?

A. I asked him if this was his baggage, and he said, "Yes, sir."

Q. Did you ask him where he lived?

A. I asked him if he resided in Canada. He said he did, in Montreal.

Q. (COURT.) Go on, and tell us all he said without being asked.

A. Then I asked him if he had just his used personal wearing apparel, and he said, "Just my own personal wearing apparel."

Q. (MARRS.) And that bag was sealed by you and was it tied with something?

A. A cord was put around the bag.

Q. Was that done by the baggage master?

A. Yes, sir.

Q. That is, the cord was put around the bag by the baggage master and you sealed it?

A. Yes, sir.

Q. Did you see the bag later?

A. I saw it as it went on the truck to go out to the train.

Q. This manifest, "Gov. No. 1" does it bear your signature on the front side?

A. It does, right here, sir.

15 Q. And did you put a number on this manifest?

A. Yes, sir.

Q. What number did you put on?

A. 394032.

Q. Was there a baggage check on this bag at the time?

A. Yes, sir.

Q. Whether or not the number on the baggage check was the same number you put on this manifest?

A. It was the same.

Cross-examination by Mr. BARNES:

Q. Mr. Wright, I assume that in making this examination in Canada you were acting in accordance with certain customs regulations, were you not?

A. Yes, sir.

Q. Do you know what regulation that is?

A. I couldn't tell you; no, I don't know the number of the regulation.

Q. Why was it that you corded and sealed this bag in Montreal?

A. Well, that is the custom.

MARTIN. If your honor please, I think this question is a little misleading for the reason he hasn't testified that he cord[ed] sealed it.

COURT. That is all right; he may tell it.

A. The baggage is corded by the baggageman, and then we make out this customs manifest and put the seals on the baggage.

Q. So the baggageman had the bag for some time before you sealed it, didn't he?

A. No, sir; it was sealed right away.

Q. Right away?

A. Yes, sir.

Q. Were you at that time operating under section 224 of the
16 customs regulations of 1923?

A. I can't say as to that.

Q. Did you get any instructions from anybody as to what you were to do?

A. We have our general instructions, yes; which we follow out.

Q. Aren't those general instructions the Treasury Regulations under which you hold office and act?

A. Yes; they are.

Q. And you don't know which of those regulations it was which caused you to do the act which you performed or ordered performed in this case?

A. I couldn't say which regulation it was; no, sir.

Q. Do you know what regulation it is that requires you to make an examination in Canada outside the United States?

A. No, sir; I don't.

Q. Do you know what the regulations are with regard to examination of passenger's baggage?

A. Yes, sir.

Q. Did you follow the regulations in making the examination about which you have testified?

A. I think I did.

Q. Did anybody tell you to make that examination prior to the time when this bag was delivered to you?

A. No, sir.

Q. Did you ever hear anything about it before that time, about that bag?

A. No, sir. Yes, sir; I had. About the bag?

Q. About the bag.

A. Yes, sir.

Q. Somebody tell you to look out for it or something of that kind?

17 A. Well, I didn't know just what the bag was to be, what baggage; no, sir.

Q. But you were watching out for this particular bag on somebody's instructions, were you not?

A. Not that particular bag.
Q. Any particular bag belonging to that particular man, then?
A. Yes, sir.
Q. You were?
A. Yes, sir.
Q. And you examined this bag with that idea in mind?
A. No, sir; I can not say I did.
Q. Did you disregard your instructions?
A. Oh, yes; I examined the bag with that idea in mind.
Q. And you didn't find anything in it that was dutiable?
A. No, sir.

Redirect examination by Mr. Martin:

Q. You have your instructions from your superior officer, do you recall, Mr. Wright?
A. Yes, sir.
Q. And did you carry out the instructions of your superior officer in this case?
Barnes. That is objected to.
Court. That is too general.
Martin. It is following what he has brought out.
Q. What is the purpose of making the inspection there at Montreal of baggage going into the States?
Barnes. That is objected to, if your honor please, on the ground it is calling for a legal conclusion, or a regulation, from the mind of the witness.
Court. Well, we have got what he did there; that is all right.
Martin. He opened up that line of inquiry.
Barnes. I was cross-examining.
Court. Well, you better come right down as fast as you can to the material things.
Martin. That is all, Mr. Wright.
Court (to jury). Mr. Bowen is appointed as foreman.
(Recess.)

Willis E. Fuller, called by Government, previously sworn.

Direct examination by Mr. Martin:

Q. Your name is Willis E. Fuller?
A. It is.
Q. You live at St. Albans, Vermont?
A. I do.
Q. You are a United States customs inspector?
A. I am.
Q. And you have been for several years?
A. Twenty five years.
Q. And your duties for the last year have been running from Montreal to St. Albans on the train?

A. They have.

Q. Were you on duty on the 28th day of January, 1926?

A. I was.

Q. And did you have on your uniform?

A. I did.

Q. What did your uniform consist of?

A. A blue suit with the regulation uniform buttons, brass buttons, and insignia on my cap, "U. S. customs inspector."

Q. And did you run on the train known as the Washingtonian which left Montreal at 8.15 on the afternoon of that day?

A. I did.

Q. And you ran as far as St. Albans, Vermont?

A. I did.

Q. In making that trip did you see this defendant, Mr. Ritterman?

A. I did.

Q. When you first saw him, was he in the smoking compartment of the sleeper?

A. He was.

Q. And did you ask him some questions?

A. I did.

Q. What did you ask him?

Mr. Burgess. That is objected to, if your honor please, on the ground—well, on the same grounds that I have stated before, that until the time comes when this crime should be, can be committed facts arising prior thereto are incompetent, immaterial, and irrelevant.

Court. I will allow this subject to the defendant's objection and under his exception, and this will apply to all this witness says without your renewing your objection and taking any further exception.

(Exception by defendant.)

Q. (Question read.)

A. I asked him to open his baggage for inspection.

Q. Did he go to his berth for that purpose?

A. He did.

Q. (Court.) Now go on and tell what occurred there without the district attorney's asking you any further questions just now.

A. I asked him to open his baggage for inspection. He went to his section in the sleeping car and he opened his case, a small case, and I turned and addressed him, requesting—asking him if he had anything to declare, and he said, "No," he said, "There it is." I inspected the case, which was a very small one, 12 by—I should think about 14 inches long, 12 inches wide and maybe five inches deep—very little in it—and I passed along and continued on my duties to inspect the rest of the train.

Q. (Martin.) This happened before you crossed the Dominion line?

A. It was.

21 BARNES. That is objected to unless it be shown that this witness has exact knowledge of the exact time and place, and no foundation has been laid for that.

COURT. He has put that in his question; I will let that stand; I will give you great latitude in cross-examining him as to where the line is.

BARNES. Exception.

(Exception by defendant.)

Q. After you passed the Dominion line, did you have further conversation with him?

A. I did.

Q. And about where in the United States?

A. That was between Highgate and St. Albans, very close, I should say, as the train was running at the time; as near as I can estimate it was close to Swanton Junction.

Q. And that is near the Canadian line, isn't it?

A. It is three miles this side of the Canadian line, about.

Q. On the second occasion what did you ask him and what did you do in his presence?

A. I simply stated that I desired to look at his baggage once more, and also asked him if he had anything to declare; he said, "No"; I gave it quite an examination again, and passed him by.

Q. While you were running from Montreal to St. Albans, did you see a Gladstone bag in the baggage room?

A. I did.

Q. And did you compare any numbers on the baggage check?

A. I did; I was notified the check number and I looked for the baggage.

Q. And did you find the baggage number on this Gladstone 22 bag?

A. I did.

Q. And it was the same number that you had?

A. The same number that I had.

Q. And whether or not that bag was sealed by a custom officer?

A. It had been sealed by a customs officer, and the seals were intact.

Q. And hadn't been disturbed?

A. Not a bit.

Q. If they had been disturbed, you would have known it and examined it?

A. I should.

Q. And was there a manifest on that bag?

A. There was.

Q. And did you compare the numbers on the manifest with the numbers on the baggage check?

A. I did.

Q. And with the number that you had?

A. With the number that I had.

Q. Whether or not it was the same number?

A. They were.

Q. The same number?

A. Yes.

Q. I show you this Gladstone bag, and ask you if that is the one?

A. That is the identical one.

Q. When you reached St. Albans, did you take the defendant off the train?

A. I requested him to get off, which he did.

Q. And he got off with you?

A. He did.

Q. And did you order this Gladstone bag off the train?

A. I did.

Q. When you got to St. Albans and you and the defendant got off the train, who did you meet?

A. I met Mr. Walsh, Mr. Whitehill, and Mr. Walsh.

Q. Mr. Whitehill is the collector of customs?

A. He is.

Q. And Mr. Walsh is assistant collector?

A. He is.

Q. What is Mr. Walsh's first name?

Court. Maurice.

A. Yes.

Q. Did you meet them there at the station?

A. They were standing there waiting for the train.

Q. Whether or not you turned this defendant, Mr. Ritterman, over to them?

A. I did.

Q. And did they go to the customs office?

A. They did.

Q. Mr. Ritterman, Mr. Walsh and Mr. Whitehill?

A. Yes.

Q. And did you follow them up to the customs office?

A. Not right close, but I followed right a short distance back of them.

Q. And at about the same time was this Gladstone bag brought to the customs office?

A. It was.

Barnes. That is objected to on the ground that no foundation has been laid for the question by showing that this witness was anywhere near this Gladstone bag.

Court. Did you see the Gladstone bag carried to the collector's office?

Barnes. It was in the baggage room, he said.

Q. Did you see it carried to the collector's office?

A. Yes.

Court. That makes it all right.

Q. Martin. You saw it after it reached the collector's office, did you not?

A. I did.

Q. And while you were there at the customs office that evening, you saw it after it had been opened?

A. I did.

Q. And you took something out of it?

A. Yes, sir.

Q. What did you take out of it?

BARNES. That is objected to on the ground that until the crime has been shown then the evidence is immaterial. What was in it or what was done with it is, as was said in the Keck case, solely a question of whether or not up to a certain time a man alleged to have smuggled, change his mind. Now it is putting the cart before the horse, I think, trying to prove something without proving the facts that lead up to it.

MARTIN. This simply saves recalling witnesses two or three times to keep in exact proper order.

COURT. I will admit that; the defendant has an exception.

(Exception by defendant.)

Q. (Question read.)

A. A collar box.

Q. Did you examine what was in the collar box?

A. Upon examining the collar box I found a small packet on one side containing diamonds.

Q. COURT. Go on and tell what else, if anything.

A. That is all that I had to do with it. I passed the collar box over to Mr. Walsh.

Q. MARTIN. When you examined this Gladstone bag at the customs office, had the seal been broken?

A. Yes; when I was examining it, it was broken.

Q. When you took out the diamonds?

A. Yes; it had been broken.

Q. But before that time, after it had reached the custom office, had the seal been broken?

A. No, sir.

Q. (COURT.) Did you see the seal broken?

A. No, I did not.

Q. (MARTIN.) But you saw it at the custom office before the seal was broken?

A. Yes; delivered there seal intact.

Q. Does this train known as the Washingtonian stop anywhere from Montreal to St. Albans?

A. St. Lambert, St. Johns, St. Armand, Swanton Junction, but at Swanton Junction no passengers off or on.

Q. And did it make those stops that night?

A. It did.

Cross-examination by Mr. BARNES.

Q. The first scheduled stop of that train in the United States is St. Albans, isn't it?

A. No, Swanton——

Q. First scheduled stop?

A. Yes; scheduled stop; yes, sir.

Q. Now, Mr. Fuller, when you made this examination on the train, I suppose you made it in the way you always make examinations, didn't you?

A. Just about the same.

Q. Didn't do anything unusual or out of the way?

A. No, sir.

Q. You gave this passenger and his baggage the same examination that you give to the ordinary passenger and his baggage?

A. Yes, sir.

Q. Then why did you go back and ask him the second time?

A. Because I had been notified that there was a suspicious
26 case there.

Q. So this was not an ordinary——

A. And I was guarding the Government in making the declaration on United States soil.

Q. You were what?

A. Making a positive case; no question that I didn't ask him to declare on United States soil.

Q. In other words, you had been told to make a certain case against this man by asking him certain things in a certain way, hadn't you?

A. No, sir.

Q. What did you mean by the statement you just made, then?

A. I done that out of my own initiative.

Q. Well, when you went back the second time to this man, you went back there because some one had told you to give this fellow special attention. Is that right?

A. Yes, sir.

Q. So you gave him a good deal—you gave him more attention than it was your habit to give the ordinary passenger. Is that true?

A. Yes; the ordinary passenger.

Q. Now when you asked him if he had anything to declare, where were you?

A. Which time?

Q. Both times.

A. Well, I can not give you the exact spot, but it was very close to Swanton Junction, running by the regular time of the train.

Q. The second or the first time?

A. The second time.

Q. How about the first time?

A. The first time, I should judge, I was between St. Lambert and St. Johns.

27 Q. That is in Canada?

A. Yes; this is the ordinary running point when I make the inspection.

Q. And you thought it wasn't enough to ask him in Canada, so you asked him again in the United States. Is that right?

A. Yes, sir; to give him all the chance in the world.

Q. And you asked him about—whether he had anything to declare?
A. That is the words.
Q. And you went into the baggage car and saw this bag?
A. I did.
Q. This Exhibit 2?
A. I did.
Q. How did you happen to go into the baggage car to look at a corded and sealed parcel sent from Montreal to the first port of entry in the United States?
A. Because I was informed that bag was in there.
Q. That wasn't a part of your business ordinarily, was it?
A. Oh, yes.
Q. To look at corded and sealed packages on the train?
A. I do; I look at all of them.
Q. Under what regulation do you proceed when you are doing that?
A. I can't, only as a guard; I have got to know what package is sealed and what is not sealed and look into the open packages.
Q. Now, when you asked this passenger, "Have you anything with you to declare?" you were in his section or were you in the smoking room?
A. In the compartment of the car near his section.
Q. And at the time you asked him, "Have you anything with you to declare?" did you look under the seat?
A. Yes, sir.
Q. Now, when you interrogated this passenger the second time you knew at that time that this Gladstone bag was in the baggage room, didn't you?
A. I did.
Q. So when you asked him if he had anything to declare you knew this bag was there and some one had informed you that this man was probably bringing something into the United States, didn't you?
A. I did.
Q. Well, did you say anything to him at that time?
A. No, sir; I did not.
Q. Did you tell him that you thought he was smuggling the diamonds?
A. No, sir.
Q. Did you tell him that you knew he had something that he should declare?
A. No, sir; I did not.
Q. You didn't consider that that was a part of your duty?
A. Not at that time.
Q. Now, Mr. Fuller, did you accompany this Exhibit 2, this Gladstone bag, from the train to the customs house at St. Albans?
A. I did.
Q. Did you carry it yourself?
A. No, sir.

Q. Who carried it?

A. Mr. Kendrick.

Q. And you were with him all the time?

29 A. I was right in sight of it.

Q. Was it open at that time?

A. No, sir.

Q. Did you open it?

A. No, sir.

Q. Did you see it opened?

A. No, sir.

Q. The next time you saw it, you fished out of it a collar box that had some diamonds in it. Is that right?

A. Yes, sir.

Q. You don't know whether they were in there when you took it up from the train to the customs house, do you, of your own knowledge?

A. I couldn't swear to that, of course; but I know they was in there; I took them out of the bag.

Q. Yes; you took them out of the bag in the customs house?

A. Yes, sir.

Q. So you have testified, but you don't know whether they were there when you carried that bag up from the train?

COURT. He says no.

BARNES. Strike that out.

Q. Do you know whether they were in the bag when you carried it up from the train to the customs house at St. Albans?

A. Why, no.

Q. Did you have very much of a conversation with the defendant, Ritterman, either upon the occasion of your first examination or your second?

A. No, sir; no words at all with him.

30 J. B. KENDRICK, called by Government, previously sworn.

Direct examination by Mr. MARTIN:

Q. Your name is J. B. Kendrick?

A. Yes.

Q. And you are a deputy collection and inspector of customs for the United States?

A. Yes.

Q. You are located at Montreal, Canada?

A. Yes, sir.

Q. And have been located there how long?

A. Since Jan. 21st.

Q. This last January?

A. Yes, sir.

Q. Did you ride from Montreal to St. Albans, Vermont, on the 28th day of January, 1926, on the train known as the Washingtonian, leaving Montreal at eight o'clock and fifteen minutes in the afternoon?

A. I did.

Q. Did you see the defendant, Mr. Ritterman, on that train?

A. I did.

Q. Whether or not you sat in the smoking compartment of the sleeper with him?

A. I did.

Q. Did you know Mr. Willis E. Fuller, the inspector of customs, was on the train that evening?

A. I did.

Q. Did you see Mr. Fuller, or hear Mr. Fuller have some conversation with Mr. Ritterman?

A. I did.

Q. You may tell the jury what you saw and heard in connection with Mr. Fuller and Mr. Ritterman?

BARNES. That is objected to, if your honor please, on the ground that there has no foundation been laid for such a question, and it might well become the worst kind of hearsay unless it be shown in advance that this witness was present, actually present, when this conversation took place, and that has not been shown.

COURT. He says he was present and heard the conversation between them.

BARNES. He didn't say he was present; he said he heard some conversation between them, because that was the way the district attorney asked the question.

COURT. That is all right; a man couldn't hear it unless he was within hearing distance.

BARNES. He might, if your honor please, hear snatches of it, which failed wholly to give him the context.

COURT. That would be considered then for what it was worth, if he only heard part. He may tell.

(Exception by defendant.)

(Question read.)

A. I heard Mr. Fuller ask Mr. Ritterman if he had anything to declare, any declaration to make, and Mr. Ritterman said he did not.

Q. Whether or not you heard more than one conversation between them?

A. I did; I heard two.

Q. Whether or not the first conversation was in Canada?

A. It was.

Q. And did you hear a conversation between them after they passed the Dominion line?

A. I did.

Q. About where in the United States?

A. I should judge between Swanton and St. Albans.

Q. And did you hear Mr. Fuller ask Mr. Ritterman any question on the second occasion?

A. I did.

Q. And what was that question?

32 A. He repeated the question he asked the first time; that is, "Have you any declaration to make?"

Q. And did you hear Mr. Ritterman's reply?

A. I did—but I didn't hear him, that is—no; I did not.

Q. Mr. Fuller spoke loud enough so you heard him?

A. He did.

A. Did you see Mr. Fuller examine any bag he had there at his berth?

A. I did.

Q. About how large a bag was that?

A. That bag, I should judge, was about five or six inches deep and a foot and a half long, a small leather bag.

Q. I show you this Gladstone bag, "Gov. No. 2," and ask you if you saw that on the train?

A. I did.

Q. And where did you see it?

A. In the baggage car.

Q. And did you examine some numbers that you had with the numbers on that bag?

A. I did.

Q. Was there a manifest on the bag?

A. There was.

Q. Was there also a baggage check?

A. There was.

Q. And did you examine the numbers you had with both the numbers on the baggage check and the manifest?

A. I did.

Q. Whether or not they were all the same?

A. They were.

Q. Was that bag properly tied and sealed?

A. It was.

Q. By a customs officer?

A. Yes, sir.

Q. Did you see the bag—did you get off the train at St. Albans?

A. I did.

Q. Did you see Mr. Ritterman there at St. Albans?

33 A. I did.

Q. Did you take this bag from the station at St. Albans to the customs office?

A. I did.

Q. And where did you get it?

A. In the baggage room.

Q. Did you carry it all the way to the customs office?

A. I did.

Q. And you saw it after you got to the customs office?

A. I did.

Q. Had the seal been broken?

A. It had not.

Q. All intact?

A. Yes, sir.

Q. If it had been opened since it was sealed at Montreal, you would have known it, wouldn't you?

BARNES. That is objected to on the ground that it is grossly leading; it is putting the answer into the mouth of this witness.

COURT. That is all right.

(Exception by defendant.)

Q. (Question read.)

A. I would.

Q. Whether or not you and someone else examined this bag marked "Gov. 2," there at the customs office?

A. I did; helped examine it.

Q. Who was the man that helped you examine it?

A. Inspector Flynn.

Q. And what are his initials?

A. J. J.

Q. He is a deputy collector and inspector of customs?

A. Inspector of customs.

34 Q. Who opened the bag, he or you?

A. Flynn opened the bag.

Q. And what did he open the bag with?

A. A key.

Q. After the bag was opened you and Mr. Flynn made an examination?

A. We did.

Q. And a little later Mr. Fuller assisted?

A. He did.

Q. Did you find anything in the bag that wasn't right?

A. Yes, sir.

Q. What did you find?

A. Found diamonds.

Q. Just where did you find them?

A. In the toes of socks rolled up and inside of a talcum-pow'er can, and found some in a collar box.

Q. And the diamonds that were found in the talcum-powder can, were they mixed up with talcum pow'er?

A. They were.

Q. Is the collar box and the talcum can inside this bag?

A. It is.

Q. Can you open it?

A. I haven't the key.

Q. Do you know who has the key to-day?

A. I think Mr. Fuller has the key.

Q. Do you know whether this bag is locked or not?

A. No; I don't.

Q. Who cut the cord, you or Mr. Flynn?

A. I believe Flynn cut the cord.

Q. Until he did that, it had been perfectly intact as to seal until the diamonds were seized?

A. Yes.

Q. Who broke the seal, you or Mr. Flynn?

35 A. The seal is a part of the cord, and when the cord is cut——

Q. When you cut the cord that breaks the seal?

A. It does; yes.

Q. Those bags are sealed by the two ends of the cord being sealed?

A. Yes, sir.

Q. The bag was tied with a cord, and the two ends of the cord sealed, so that it would be impossible to in any way interfere with that without its being discovered?

A. Yes; it would.

Cross-examination by Mr. BARNES:

Q. You are a deputy collector located at Montreal?

A. Yes, sir.

Q. And you have been a deputy collector since Jan. 21st, 1926?

A. No, sir. I have been in Montreal since Jan. 21st.

Q. Before that were you deputy collector?

A. I was.

Q. Where?

A. St. Albans, Newport——

Q. Do you usually ride over on the train in the evening from Montreal to St. Albans?

A. I do not.

Q. Was there any particular reason for your riding over on the evening of Jan. 28th?

A. To accompany Mr. Ritterman.

Q. That was the purpose of your trip?

A. It was.

Q. And you stayed in the vicinity of Mr. Ritterman so that you could hear what the inspector said to him and what he said to the inspector?

A. I did.

Q. In other words, you came over on that train in the capac-

36 ity of a spy. Is that right?

A. I came over there as deputy collector and inspector of customs to assist Mr. Fuller.

Q. Did you have any duty on that train that you couldn't perform in Montreal?

Court. Tell him.

A. I came on the train to assist Mr. Fuller, if necessary, in his duties.

Q. Did you ask this passenger any questions on the train?

A. I think I asked him for a match in the smoking compartment.

Q. Still part of the spy business?

A. If you so declare.

Q. Now when—when you were on that train, did you go out to the baggage car and look at this Exhibit 2, this Gladstone bag?

A. Before the train left Montreal.

Q. Did you see it after that?

A. I did not.

Q. Your business was to watch the passenger and not the bag. Is that it?

A. My duty was to be of what assistance I could to Mr. Fuller on the train.

Q. Is it usual to have a deputy collector and inspector to assist an inspector?

A. Quite common.

Q. Which of these two is the higher office?

A. The man in charge of the train.

Q. No; in the customs service which of the two is the higher officer?

A. Mr. Fuller is my senior in the service.

Q. So you were assigned to do a particular piece of work on that night?

A. I accompanied him from Montreal.

37 Q. Now you answered, I believe, to a question by the district attorney that you saw this bag on the train?

A. I did.

Q. Didn't you just a moment ago tell me you didn't see it till you got to St. Albans?

A. I compared the numbers of that bag with the numbers I had, in the Bonaventure Station in Montreal, on the train.

Q. On the train at Montreal?

A. At Montreal.

Q. And you compared the number on the bag, and you checked it up with the baggage check, is that it?

A. I did.

Q. And you also looked at the manifest?

A. Yes, sir.

Q. So that you knew that that bag was on there, didn't you?

A. I did.

Q. And you also knew that you had been assigned to watch this man, because you knew that he had dutiable merchandise with him, didn't you?

A. I suspected he did.

Q. You stated in answer to a question of the district attorney that you would have known if a seal had been broken on this bag?

A. Yes.

Q. Have you never heard of seals on baggage and on freight cars, etc., being intact in spite of the fact that they had been opened?

A. I have never had definite—I have never witnessed the changing of seals.

Q. Is there anyone else—do you know whether anyone else in the world has a seal of the kind they use at Montreal?

38 A. We have them at the different customs offices along the entire frontier.

Q. So that at least in some other customs office it would have been possible to have renewed that seal, wouldn't it?

A. Yes.

Q. So that you can't be sure, can you, that that seal was intact from the time it left Montreal till you opened it at the customs house at St. Albans, unless you personally accompanied the bag during that time, can you?

A. The seal was intact on the train and in the customs house. I did not—I was not with the bag during the entire voyage.

Q. You don't know whether that was the same seal that was put on at Montreal or not, do you?

A. I couldn't swear to it.

Q. You can't swear to it?

A. No.

Q. Now, it is the practice, is it not, on passengers' baggage from Canada, to send it through to the first port of entry in the United States, and there deliver it from the train to the baggage room at that station?

A. It depends where the ultimate destination of the baggage is, where it is going.

Q. So you don't take all bags off at St. Albans and put them in the baggage room?

A. If the bag is checked to New York, naturally it would go to New York.

Q. So at that particular point, this bag traveled an entirely different road than other bags travel, didn't it?

A. The bag was taken off at St. Albans.

Q. That is contrary to your usual practice?

A. Yes, sir.

Q. Now, when you personally received this bag as you testified you did from the baggage room at St. Albans, what did you do with it?

A. Carried it to the customs house.

Q. Was anyone with you besides Mr. Flynn?

A. Mr. Bingham was with me.

Q. And Mr. Bingham. Why did you carry it to the customs house?

A. Instructions.

Q. Whose?

A. Collector's.

Q. You mean Collector Whitehill of the port of St. Albans?

A. Yes, sir.

Q. When you got there, did you cut this cord that you say was on it?

A. I did not.

Q. Did you open this bag?

A. I did not.

Q. Did you see that cord cut?

A. I did.

Q. Who cut it?
A. J. J. Flynn.
Q. Did you see the bag opened?
A. I did.
Q. Who opened it?
A. Flynn and myself.
Q. Did you have a key?
A. Flynn had a key.
Q. Who gave it to him?
A. Mr. Ritterman.
Q. Were you present when Mr. Ritterman gave it to him?
A. I was not.
Q. So that's on somebody else's statement, is it?
40 A. Mr. Flynn's.
Q. After Mr. Flynn opened it with the key which you say Mr. Ritterman gave him, did you look in it?
A. I did.
Q. Where were you at the time that bag was opened?
A. In Collector Whitehill's room in the customs house.
Q. In Collector Whitehill's office in the customs house at St. Albans?
A. Yes.
Q. And where was Ritterman?
A. He was in the assistant collector's room.
Q. Right next to it?
A. Across the hall.
Q. Who was sent to get this key from Ritterman?
A. Flynn.
Q. Who sent him?
A. I don't know.
Q. How do you know he was sent, then?
A. Because he made the remark he was going for the key and I should imagine——
Q. And he never goes anywhere without he is sent?
Q. He may have gone on his own initiative.
Q. Who was there when you opened this bag besides you and Mr. Flynn and Mr. Bingham?
A. I believe that was all.
Q. Did you invite Mr. Ritterman to come in and see his bag opened?
A. I did not.
Q. Did you invite him to come in and open it himself?
A. I did not.
Q. These diamonds that you have testified to finding in that bag, were just scattered around in the bag, were they?
A. They were not.
41 Q. Were they in packages?
A. In tissue paper.

Q. In tissue paper, and the tissue-paper packages were many in number, were they not?

A. They were.

Q. And they were put in among the clothes in this bag?

Q. In the socks and talcum-powder can and in a compartment in the collar box.

Q. You could see them easily enough, couldn't you?

A. No, sir.

Q. Are those packages here?

AMEY. They will be here very soon.

BARNES. How long?

AMEY. When this next train from St. Albans gets here, about noon.

Q. That train arrives at St. Albans, scheduled to arrive at 10:10, isn't it?

A. I believe it is.

Q. Was it on time that night?

A. I believe it was.

Q. Did you take the bag up to the collector's office immediately upon arrival of the train, or sometime later?

A. I proceeded to the baggage room where I got the bag and stood in the entrance way with the bag in my hand waiting for instructions.

Q. Would you care to say how long after the arrival of that train it was before you actually opened that bag in the collector's room in the customs house at St. Albans?

A. I couldn't swear to the time.

Q. Did you ever give it, or offer to Mr. Ritterman this bag?

A. I did not.

Q. Did you ever invite him to make a declaration of its contents?

A. I did not.

Redirect examination by Mr. MARTIN:

Q. Did Mr. Fuller go up with you when you carried the bag from the baggage room to the customs office?

A. He did.

G. E. BINGHAM, called by Government, previously sworn.

Direct examination by Mr. MARTIN:

Q. Your name is G. E. Bingham?

A. It is.

Q. And you are an inspector in the U. S. customs?

A. I am.

Q. And you are stationed at Montreal, Canada?

A. I am.

Q. How long have you been stationed there?

A. I went first to Montreal in 1912, and stayed until October, 1914, came back July 1, 1919, and have been there ever since.

Q. On the 28th day of last January, did you come out from Montreal on the Washingtonian that left there at 8.15 in the afternoon?

A. I did.

Q. And did you see this defendant, Mr. Ritterman, on that train?

A. I did.

Q. Did you see him after you had crossed the Dominion line?

A. I did.

Q. Did you see or hear Mr. Fuller, the inspector of customs, have a conversation with him on that train?

A. I did.

Q. At about what point?

A. At about Swanton, and after we reached Swanton station.

Q. And before reaching St. Albans?

A. Yes; before reaching St. Albans.

Q. Did Mr. Ritterman get off that train with Mr. Fuller?

A. At St. Albans.

Q. And you got off, too?

A. I did.

Q. And did you go to the customs office?

A. I did.

44 Q. Did you see this Gladstone bag taken up to the customs office?

A. I did.

Q. And you were with Mr. Kendrick and Mr. Fuller when it was being taken up?

A. I was.

Q. What did you hear Mr. Fuller say to Mr. Ritterman, and what did Mr. Ritterman reply, on the train?

A. Mr. Fuller says, "Are you sure you have nothing to declare?" Mr. Ritterman replied that he had not.

Q. Did you examine the numbers on the baggage check and on the manifest that were attached to this bag, "Gov. No. 2," while you were on the train?

A. I did.

Q. With some numbers that you had?

A. I did.

Q. And whether or not they were the same numbers?

A. I did.

Q. And did you see the bag after it reached the customs office so you know whether or not the seal had been broken?

A. I did.

Q. And had the seal been broken?

A. It had not.

Q. Did you see the bag after it was broken?

A. Well, yes; not at the time of breaking, but——

Q. But after?

A. After it had been broken; yes.

Q. Did you take something from—some piece of clothing from Mr. Ritterman and compare it with some piece in the bag, "Gov. No. 2," the Gladstone bag?

A. I was present when Mr. Harvey took a collar from Mr. Ritterman.

Q. And what are his initials?

A. Ernest.

45 Q. And he is a deputy collector and inspector of customs?

A. Yes.

Q. And you were present when he took the collar that Mr. Ritterman had on?

A. I was.

Q. And did you see him compare it with the collar or with some collars in this Gladstone bag?

A. I did.

Q. And how did it compare with the collars in the bag?

A. The number and the laundry mark was the same, but there was a difference in initial.

Cross-examination by Mr. BARNES:

Q. You are an inspector, Mr. Bingham?

A. I am.

Q. You are the second gentleman that accompanied Mr. Ritterman on this trip from Montreal to St. Albans on the night of Jan. 28th. Who told you to go?

A. The officer in cargo.

Q. In Montreal?

A. In Montreal.

Q. What were your official duties on that trip?

A. I was simply acting as a customs inspector to assist the other inspectors on the train.

Q. Now, did you men all stand around in a party and listen to what Mr. Fuller said to Mr. Ritterman?

A. No.

Q. Well, what did you do; did you hang over the back of a seat and listen to it?

A. No; I was standing at Mr. Fuller's elbow at the time he had the conversation.

Q. And Mr. Kendrick was there?

A. He was right there; yes.

46 Q. And was he right there too, at your elbow, so you were all lined up around him?

A. Mr. Kendrick was near me in the aisle.

Q. Was there anyone else there?

A. Anyone else? There was other passengers in the car.

Q. No more gentlemen that had been put on the train to spy on Mr. Ritterman?

A. No; not to my knowledge.

Q. Just you and Mr. Kendrick and Mr. Fuller?

A. They weren't present in the car; they were on the train.

Q. Other gentlemen after the same person on the train?

A. Yes, sir.

Q. Now, have you talked with anybody as to what Fuller said since this thing happened?

A. Do you mean with Mr. Fuller or anybody else?

Q. Anybody else.

A. Talked with Mr. Fuller.

Q. Talked to Collector Whitehill?

A. I don't know particular about that or not, now.

Q. Mr. Whitehill didn't ask you what you were going to testify to to-day before you went on the stand?

A. No; I believe not.

Q. Did anybody else ask you when Mr. Whitehill was present, what you were going to testify to?

A. I think the assistant district attorney.

Q. But Mr. Whitehill and others were present when the district attorney asked you?

A. Yes, sir.

47 Q. And you were standing at Mr. Fuller's elbow when he asked Mr. Ritterman, "Are you sure you have nothing to declare"?

A. I was.

Q. So you heard every one of those words used?

A. I did.

Q. Would it surprise you to know that that isn't what Mr. Fuller says he said?

A. Well, I don't know as I am quoting his exact words; that is the substance of what I understood him to say.

Q. Substance?

A. Yes.

Q. And that substance came from something that you have heard in the discussion of this case, during its preparation for trial, did it not?

A. No; it did not.

Q. The words you used this morning were your interpretation of what he asked, weren't they?

A. My recollection of what he asked.

Q. The exact words?

A. As I recall it; yes.

Q. Now if that is so, your recollection of something else at the same time would be just as good, wouldn't it?

A. I presume so; yes.

Q. Now then, why did you answer the district attorney's question by saying that Fuller said to Ritterman, "Are you sure you have nothing to declare," and then end it up by saying, "He says he has not"?

A. That is what I recall Mr. Fuller said; I can only state what I remember.

Q. That is, you remember distinctly what Mr. Fuller said,
48 but you don't remember what Mr. Ritterman said?

A. Yes; I do.

Q. Then why didn't you say that? Did he say "I have nothing to declare" or did he say "No" to the question?

A. "I have nothing"

Q. "I have nothing"?

A. That is my recollection.

Q. And you heard that quite plainly?

A. I did.

Q. And you are sure that Mr. Ritterman understood the question that Mr. Fuller asked him?

A. I can't answer for what Mr. Ritterman understood; I don't know what Mr. Ritterman understood.

Q. Now, are you testifying about the first time that Mr. Fuller interrogated Mr. Ritterman or the second time?

A. Well it must have been the second time because it was the only time I heard him ask this question.

Q. So it was the first time, so far as you are concerned?

A. No; I think not—yes; it was the first time, so far as I was concerned, that I heard it.

Q. Did you go into the baggage car?

A. I did.

Q. What did you go there for?

A. I went there with Mr. Fuller to see if there was any baggage up there belonging to this gentlemen.

Q. Was that part of your duty?

A. It was.

Q. And it was also a part of Mr. Kendrick's duty, was it?

A. Yes, sir.

49 Q. And it was also a part of Mr. Fuller's duty?

A. It was.

Q. To go and look at the same bag?

A. It was.

Q. Do you in ordinary practice send three men to look at one piece of baggage in order to tell whether it is there or not?

A. I acted on instructions from my superior officer.

Q. And you were making up a case, so you had to have three people see it. Is that it?

A. I was all the time acting under instructions from my superior officer.

Q. Now after you had spied around and heard this conversation between Mr. Fuller and Mr. Ritterman, and had gone into the baggage car, did you about that time arrive at St. Albans?

A. I had been in the baggage car previous to seeing Mr. Ritterman.

Q. And then you arrived at St. Albans?

A. Shortly after; yes.

Q. Did you have anything to do with taking this bag from the baggage room at St. Albans to the office of the collector of customs at St. Albans?

A. I did not.

Q. Where did you first see it in the customs house?

A. In the customs house?

Q. Yes.

A. In the office of the collector.

Q. On the desk or on the floor?

A. I think it was on a sofa.

Q. Was Mr. Ritterman in the office at that time?

50 A. No; he was not.

Q. Do you know where he was?

A. No; I do not.

Q. Did you talk to Ritterman in the collector's office?

A. No.

Q. Now who did you say opened this bag?

A. I don't know; I wasn't present when it was opened.

Q. Do you know how long after it was opened when you came into the room?

A. No; I wasn't present when it was opened, so I couldn't state the exact time.

Q. When you came into the collector's office, was this bag on the sofa, and it was open?

A. It was.

Q. And who told you to look in it?

A. I don't know of anyone who told me to look into it.

Q. Just out of curiosity or as a part of your official duties?

A. As a part of my official duties.

Q. And how many people had to look into that bag to make it a real examination?

A. I have no knowledge of that.

Q. Was anybody else looking in it when you looked in?

A. Mr. Fuller was looking in it at the time.

Q. And you were helping Fuller?

A. Yes.

Q. So you took a collar out of that bag. Where did you get this collar?

A. I didn't get the collar.

Q. Was it given to you?

A. It was not.

Q. Well you were testifying about it a while ago. Were you testifying about what somebody else did or what you did?

51 A. I testified that I saw Mr. Harvey take this collar.

Q. Oh. You didn't take any collars out yourself?

A. I did not.

Q. Did you take anything else out?

A. Out of the bag?

Q. Yes.

A. Why, I took clothing out in the process of my examination.
Q. Who was making this examination, you or Fuller?
A. Both of us.
Q. Anybody helping you?
A. There may have been others; I don't recollect.
Q. Well, what else did you take out? Did you give all the diamonds to Fuller and you take all the clothes, or vice versa?
A. I found no diamonds.
Q. You didn't find any diamonds?
A. I found no diamonds.
Q. You were in the same pickle as the fellow from Montreal, weren't you? He looked in and he didn't find any, either.
A. Exactly.
Q. But you took the clothes all out?
A. Not all of them.
Q. And you didn't find any?
COURT. That is what he says.
(Adjournment.)

52 2.15 P. M.

JAMES J. FLYNN, called by Government, previously sworn.

Direct examination by Mr. MARTIN:

Q. Your name is?
A. James J. Flynn.
Q. Where do you live?
A. Montreal.
Q. And you are a United States inspector of customs?
A. I am, sir.
Q. Were you at the customs office at St. Albans, Vermont, on the evening of the 28th of last January?
A. Yes.
Q. And did you see this defendant, Mr. Ritterman, there?
A. Yes.
Q. Whether or not you examined the Gladstone bag there at the custom office with Mr. Kendrick?
A. I did, sir.
Q. How did you get into the bag?
A. By unlocking it.
Q. Did you cut the cord that was tied to it?
A. Yes.
Q. Did you cut off the manifest?
A. Yes.
Q. And you unlocked it, you said?
A. Yes.
Q. Where did you get the key?
A. From Mr. Ritterman.
Q. Did you ask Mr. Ritterman for the key?
A. I did, sir.

Q. When you asked him for the key did he give you a bunch or a key ring that contained several keys?

A. He gave me a key ring with several keys.

Q. And did he pick out any particular key at the time you asked him?

A. He did, sir.

Q. And was that the key with which you opened the Gladstone bag? 53

A. Yes.

Q. And is this the bag?

A. That is the bag, sir.

Q. Gov. Ex. No. 2. I show you Gov. Ex. No. 2 and ask you if that is the manifest you cut off from that bag?

Q. That is the manifest.

Q. In making the examination of the bag did you find any diamonds?

A. Yes.

Q. In what articles did you find the diamonds?

A. Found diamonds in socks and a talcum-powder box.

Q. Will you open this bag?

A. Yes.

Q. Gov. Ex. 2. Will you find the talcum-powder box?

A. Yes.

Q. Did you find the collar box?

A. No, sir; I didn't find the collar box.

Q. Is it in there?

A. Yes, sir. I didn't find the diamonds in it; I saw it.

Q. Is the baggage check that is attached to this bag, Ex. No. 2, the same one that was on it when you opened it?

A. Yes, sir.

Cross-examination by Mr. BARNES:

Q. Mr. Flynn, how long have you been acting at Montreal, Canada, as an inspector of U. S. customs?

A. Since July 1, 1924.

Q. And your duties confine you to Montreal?

A. Not necessarily.

Q. Well, what are your duties at Montreal?

A. Inspector of customs.

Q. And as inspector of customs at Montreal, what do you do? 54

A. We examine baggage.

Q. "You" I am talking about, not "we."

A. I examine baggage.

Q. At Montreal?

A. At Montreal.

Q. How did you come to stroll over to St. Albans on the night of Jan. 28, 1926?

A. Had orders from my superior officer to go to St. Albans.

Q. You went over on the Washingtonian?
A. Yes, sir.
Q. That night?
A. Yes.
Q. So you are one of the other customs officers that were on board this train about which testimony has been given on the night of Jan. 28, 1926?
A. Yes, sir.
Q. And what were you sent there, what were you sent on that train for?
A. To assist Mr. Fuller, the officer in charge of the train.
Q. And what did you do on that train in assisting Mr. Fuller?
A. Well, I didn't have very much to do.
Q. Well, did you gather around in this party that heard Mr. Fuller and Mr. Ritterman talking together?
A. No, sir.
Q. No. Where were you then?
A. I was in the day coach.
Q. What were you doing there?
A. Sitting there riding.
Q. Where were you riding?
A. Riding to St. Albans.
Q. Just sitting there riding. Had you been doing that all the way from Montreal?
A. Not all the way.
Q. What were you doing when you weren't just sitting and
55 riding?
A. I had been in the baggage car.
Q. Who sent you there?
A. No one, sir.
Q. Why did you go?
A. I went there to see if that piece of baggage was in.
Q. How did you know there was any such baggage on the train?
A. I had the number of it.
Q. Where did you get that?
A. From Inspector Kendrick.
Q. Where?
A. Montreal.
Q. Any other inspector with you that just sat and rode?
A. I can't say all the time; some of them sat with me some of the time.
Q. Now, Mr. Kendrick, Mr. Fuller, and Mr. Bingham were on that train, weren't they?
A. Yes, sir.
Q. And you were there?
A. Yes, sir.
Q. And who else?
A. That is all the inspectors.
Q. That is all the inspectors. Were there any deputy collectors?

A. Mr. Fuller and Mr. Kendrick are deputy collectors and inspectors.

Q. And you and Mr. Bingham were inspectors?

A. Yes, sir.

Q. Well, were there any other deputy collectors, or collectors or inspectors, or other customs officers on that train that night?

A. Others got on at St. Albans.

Q. You thought you had enough with those five from Montreal?

A. That was all that was sent.

Q. Did you talk to Ritterman?

A. No, sir.

56 Q. Hear anybody else talking to him?

A. No, sir.

Q. You were just put on there to watch the baggage, is that it?

A. No, sir.

Q. But you did watch the baggage, didn't you?

A. I saw that it was on there, knew that it was on there.

Q. Go into the baggage car frequently on the way down?

A. No, sir.

Q. Just once?

A. I couldn't say for sure how many times.

Q. More than once?

A. Yes; I think I went in more than once.

Q. Every time the train stopped?

A. No, sir.

Q. Well, were you afraid somebody would take it off while the train was going?

A. No, sir.

Q. When you got to St. Albans, you and Mr. Fuller and Mr. Bingham and Mr. Kendrick and Mr. Ritterman got off the train together. Did you have anything to do with the transporting of this Ex. 2, this Gladstone bag, from the train to the baggage room?

A. No, sir.

Q. Did you see it transported?

A. No, sir.

Q. Were you attending to your job by letting it get out of your sight at St. Albans?

A. Yes.

Q. You were?

A. Yes, sir.

Q. Why?

A. I knew where the bag was.

Q. And you knew somebody else was watching it?

A. I knew it would be safe.

57 Q. Now you didn't say anything to Mr. Ritterman at any stage of the proceedings up until you arrived in St. Albans, did you?

A. No, sir.

Q. Did you help to transport this bag from the railroad train to the baggage room or from the baggage room to the customs house?

A. No, sir.

Q. When was the first time that you saw it in the customs house?

A. Soon after we got there.

Q. That same night?

A. Yes, sir.

Q. Well, how long, an hour, an hour and a half?

A. As soon as I got in the room.

Q. No, how long was that after the train arrived?

A. Probably eight or ten minutes.

Q. Eight or ten minutes, and where was the bag when you saw it in the customs house?

A. In the collector's office.

Q. Was it open or closed?

A. Closed.

Q. And you say you cut the cord?

A. Yes, sir.

Q. Are you an inspector of customs at the port of St. Albans?

A. No, sir.

Q. Do you know that the Treasury Regulations of 1923 provides in article 224 that when baggage from Canada or from a contiguous country arrives at the first port of entry in the United States that it is the duty of the inspector at that port to cut the seal?

A. I was detailed to do it.

Q. You have heard of that regulation, have you?

58 A. The officer at the port takes care of it, certainly.

Q. And you weren't assigned to the port of St. Albans, but to Montreal. That is right, isn't it?

A. I was detailed to do it. Montreal is my official station.

Q. And yet you were the one that cut the seal, or the cord, on the corded and sealed piece of baggage that had come from Montreal, were you?

A. Yes, sir.

Q. By whose authority did you take such an action outside of your official duties?

A. I was detailed to St. Albans that night.

Q. Who detailed you?

A. Mr. King.

Q. Of Montreal?

A. Yes.

Q. He told you to go on the train and watch this man Ritterman to St. Albans?

A. Yes.

Q. Did he tell you to open this corded and sealed package at St. Albans or did the collector at St. Albans tell you to do that?

A. Neither told me.

Q. Neither one—did it on your own accord?
A. Yes.
Q. Now when you opened this bag, after cutting this cord and removing the seal, you did so with a key furnished by Ritterman?
A. Yes.
Q. You asked him for that key and he gave it to you?
A. I did, sir.
Q. Did you have to use any force to take it away from him?
A. No, sir.
59 Q. He complied immediately with your request?
A. Second request.
Q. What is that?
A. My second request.
Q. Second request for what?
A. For the keys.
Q. How far apart were they made?
A. Well, they were one right after the other as fast as they could be.
Q. So you don't know whether he understood your first request?
A. Well, I asked the other one to be sure.
Q. At least you had no trouble in getting the keys?
A. No, sir.
Q. He did it of his own free will and accord?
A. Yes.
Q. Now you said you found a collarbox in that Ex. 2, that Gladstone bag, and you also said that you didn't find any diamonds in that collarbox?
A. I didn't open it.
Q. You didn't open it. Now somebody told you in Montreal to get on that train and watch this man, hadn't they?
A. Yes, sir.
Q. So that you knew he had a piece of hand baggage with him, a small case?
A. On the train?
Q. Yes; in his hand, that is, that he kept with him in the seat.
A. I didn't know it, sir.
Q. You didn't see him on the train?
A. I didn't see him on the train.
Q. You were put on that train to watch him and you didn't see him. Why?
A. I didn't want to see him.
60 Q. So you didn't comply with your orders?
A. Yes, sir.
Q. When you opened this bag in the collector's office, who was with you?
A. Collector Kendricks.
Q. He was the only one that was with you?
A. He was the one that helped me examine the bag.

Redirect examination by Mr. Martin:

Q. Were you directed by someone to examine this bag, Gov. Ex. No. 2? Were you requested by someone at the customs office in St. Albans to examine this bag?

Barnes. That is objected to, if your honor please.

Court. I will allow it.

Barnes. Exception.

(Exception by defendant.)

A. We were requested to examine the bag; I can't say who requested it.

Q. You were requested by someone there?

A. Someone there, but I can't say who.

Q. When these diamonds were found in that bag, to whom were they delivered?

A. Put on the collector's desk.

Q. Was Mr. Walsh there?

A. Mr. Walsh was there.

Q. Did he take charge of them?

A. Yes, sir.

61 Harry C. Whitehill, called by Government, sworn.

Direct examination by Mr. Martin:

Q. Your name is Harry C. Whitehill?

A. Yes, sir.

Q. And you are the collector of customs for the district of Vermont?

A. Yes.

Q. And you have been for how long?

A. Going on four years.

Q. Were you at St. Albans on the 28th day of last January?

A. Yes, sir.

Q. And were you and your deputy collector, Mr. Walsh, at the station at St. Albans at the time the Washingtonian arrived from Montreal that evening?

A. Yes.

Q. And whether or not this defendant, Mr. Ritterman, was delivered over to you by Inspector Fuller?

A. He was.

Q. And did you and Mr. Walsh take him up to your office?

A. Yes, sir.

Q. And upon arriving at your office did you ask him some questions?

A. I did.

Q. What did you ask him?

A. I asked him what his name was. He said, "R. Ritterman." I asked him where he lived. He said, "Antwerp." I asked him if he had anything to declare. He said, "No, sir." I asked him the second time; I said, "Are you sure you have nothing to declare?" He says, "I have nothing to declare." My third question was, "Have you any diamonds to declare?" He said, "No, sir."

62 Q. Did you then turn him over to your assistant, Mr. Walsh?

A. I did.

Q. The Gladstone bag that was brought up to your office that evening about the same time was examined by some of the inspectors?

A. Yes.

Q. And diamonds were found in it?

A. Yes, sir.

Q. And these you took charge of?

A. Yes.

Q. And those diamonds were put in the vault that evening?

A. Yes.

Q. The vault at the——

A. The vault at the customs office.

Q. And who did you order to bring those up to your office the next morning?

A. Mr. Kendrick.

Q. And did he bring them to your office?

A. He did.

Q. And did you have those diamonds examined for the purpose of appraisal?

A. I did.

Q. Do you have some one in your department that does the appraising?

A. Yes.

Q. And what is his name?

A. Mr. Orton.

Q. What is his first name?

A. Charles R., I think, is his initials.

Q. And did you call some jeweler in to assist him?

A. I did.

Q. What is his name?

A. Mr. Armstrong; Merrill Armstrong, I think it is.

Q. And they examined those diamonds in your office?

63 A. They did.

Q. At your request?

A. Yes, sir.

Q. And after they had completed their examination, did they seal them up?

A. They did.

Q. And did you order someone to take them in charge from that time on?

A. I did.

Q. And who was that?

A. Mr. Sawyer, the cashier of the office.

Q. What is his first name?

A. Clarence.

Q. Did you give any instructions as to where to put them?

A. I did.

Q. And keep them?
A. Yes.
Q. And where was that?
A. In the bank.
Q. What bank did you tell him to keep them in?
A. The Weldon National Bank.
Q. And they have been in his charge since then?
A. They have.

Cross-examination by Mr. BARNES:

Q. Mr. Whitehill, did you go with Ritterman and three or four or five deputy collectors and inspectors from the train shed or station at St. Albans to the customs house on the night of January 28th?
A. I did.
Q. Will you state who was in the party that night?
A. Mr. Walsh, my assistant, Deputy Collector and Inspector Kendrick, Deputy Collector and Inspector Flynn, Deputy
64 Collector and Inspector Fuller, Deputy Collector and Inspector Harvey. I think that is all, Mr. Barnes; I am not sure, though.
Q. You think you had rough there to keep him from getting away?
A. I intended to; yes.
Q. When you got to your office in the customs house, did you tell Ritterman that he was under arrest?
A. I don't recall that I did.
Q. You have stated that you asked him if he had anything to declare, and he said, "No, sir." Didn't you at that time tell him also that you knew he had diamonds with him?
A. No, sir.
Q. But you did know he had them, didn't you?
A. No, sir.
Q. Did you turn him over to Deputy Collector Walsh for examination?
A. I did after I finished with him; yes.
Q. Was Walsh there when you asked him these questions?
A. Yes, sir.
Q. Were you there when Inspector Flynn came in and asked him for the key to his bag?
A. No, sir.
Q. Where were you then?
A. I think I had gone to the hotel.
Q. Why did you ask him if he had any diamonds to declare if you didn't think he had diamonds with him?
A. Why, from the fact that we had information concerning this man; he had been circularized through the customs department for six months.
Q. Watching for him?

A. Yes.

64½ Q. Did you have anything to do with putting these inspectors on the train?

A. What do you mean, my regular inspectors?

Q. The inspectors who were on the Washingtonian the night of January 28.

A. No; no, sir.

Q. Do you know under what circumstances you or the customs officers acting in this matter received information that he was going to bring things into the United States unlawfully?

A. Through the customs exchange.

Q. Do you know where they got such information?

A. I do not.

Q. After you had asked this man if he had anything to declare, and he said "No," did you have any other conversation with him? I mean that same night.

A. No; only what I have stated in my testimony.

Q. So that all subsequent happenings in connection with Mr. Ritterman were under the direction of Mr. Walsh?

A. Absolutely.

65 MAURICE WALSH, called by Government, previously sworn.

Direct examination by Mr. MARTIN:

Q. Your name, Mr. Walsh?

A. Maurice Walsh.

Q. And you are a deputy collector of customs for the district of Vermont?

A. Assistant collector of customs.

Q. I mean assistant collector?

A. Yes.

Q. And you have held that office for how long?

A. About four years I have been assistant collector.

Q. And were you at St. Albans on the 28th of last January?

A. Yes, sir.

Q. And did you and Collector Whitehill go to the station to meet the Washingtonian that came in that evening?

A. I did.

Q. And did you see Mr. Ritterman there at the station?

A. Yes.

Q. He was turned over to you and the collector by Mr. Fuller?

A. Mr. Fuller and some of the other inspectors.

Q. And you took him up to the office. And did you hear some conversation between the collector and Mr. Ritterman?

A. Yes.

Q. You may tell the jury what that conversation was.

BARNES. That is objected to.

COURT. What is the objection?

BARNES. On the ground that the best evidence of that conversation is the testimony of the collector himself.

66 COURT. Oh, no; anyone that was present and heard it is just as competent to testify to it; the evidence is of just as high a degree as the testimony of the collector. It all depends on which one the jury would have the most confidence in, no matter whether the collector or deputy collector or office boy; if he heard it, he could testify to it. The jury might believe the office boy. Put it in.

A. Shall I——

Q. (COURT.) Go on, Mr. Walsh.

A. Why, the collector asked Mr. Ritterman what his name was. Mr. Ritterman told him, "R. Ritterman," I think, or "L. Ritterman." He asked him where he lived. Mr. Ritterman replied either Antwerp or Warsaw; I am not clear on that. The collector asked him, "Have you anything to declare?" And Mr. Ritterman said, "No." "Are you sure that you have nothing to declare," the collector asked him. He says, "I have nothing." "Are you sure that you have no diamonds to declare?" Mr. Ritterman said, "I have not." The collector then turned to me and asked me if I cared to ask Mr. Ritterman any other questions.

Q. (MARTIN.) Did you then take Mr. Ritterman and ask him some questions?

A. I did.

Q. You may tell what those were and the replies you received.

A. I asked Mr. Ritterman if he had in his baggage or on his person any articles intended for any other person or for sale or that he purchased on commission for others that he did not declare to the collector, and he said, "No." I says, "Have you any articles
67 in your baggage or on your person that belongs to any other person?" He said, "No." I said to Mr. Ritterman, "The collector asked you if you had any diamonds to declare. The reason he asked you that question was that he had had information to the effect that you had a quantity of diamonds in your possession to-day in Montreal." He replied, "I did; I placed those diamonds in the safety deposit box of the Bank of Nova Scotia in Montreal." I then told Mr. Ritterman that it would be necessary for us to inspect his person, to examine his person.

Q. (COURT.) Go on.

A. We brought Mr. Ritterman, or I asked Mr. Ritterman to step into an adjoining room, and I called two of the customs inspectors, Inspector Bingham and Inspector Fuller, who were there, to assist in the examination of his person. I asked Mr. Ritterman to remove his hat, his overcoat, his undercoat, and his collar and necktie, and by that stage of the proceedings Mr. Flynn came in and asked Mr. Ritterman for his key to his baggage. And, I think, on the second request Mr. Ritterman handed Mr. Flynn the key to the baggage or to the grip, and I told Mr. Ritterman to remove his other articles of clothing, his shoes and his trousers, and when he proceeded to remove, I think, the second shoe he says to me, "I want to
68 talk to you alone." I says, "You can't speak to me alone, Mr. Ritterman, take off that shoe." He took off that shoe, and

then he said, "I have got to speak to you alone." I said to him, "Come into the other room," and he said then, "I haven't the diamonds on my person; they are in my grip." I called Mr. Bingham in to hear what he had to say and he repeated the same thing in the presence of Mr. Bingham.

Q. (MARTIN.) How long was it from the time that Mr. Flynn obtained the key from him before he told you that he wanted to talk with you alone?

A. Oh, seven or eight minutes, I should judge.

Q. Did you learn after Mr. Flynn obtained the key—did you learn the diamonds were found in the bag? A. *Did you learn after Mr. Flynn obtained the key the diamonds were found in the bag?*

A. I proceeded with the undressing of Mr. Ritterman, and about the time that we had him undressed I learned the diamonds had been found in the bag.

Q. (COURT.) Go on and tell what else you did and what occurred there, Mr. Walsh.

A. That is about all that occurred then.

Q. Well, was there something later?

A. Well, I told Mr. Ritterman to put his clothes back on and went into the other room and saw the diamonds on the desk.

Q. (MARTIN.) Did you take charge of them?

A. Yes; I took charge of them at that time.

69 Q. Did you put them somewhere that evening?

A. Put them in the safe in the customs house.

Cross-examination by Mr. BARNES:

Q. After Mr. Ritterman said to you, "I have not the diamonds on my person; they are in my grip," you continued with your search of his person and completed it. Is that correct?

A. Yes, sir; that is correct.

Q. And then after you completed that search of his person Mr. Flynn came back and told you that they had found the diamonds as Mr. Ritterman stated in his grip?

A. Mr. Flynn? It was Mr. Harvey, one of the other officers.

Q. It's not my purpose to tangle you up; I want to get it straight.

A. Mr. Harvey; he was in and out, one of the officers.

Q. Harvey came in at that time and told you?

A. Yes.

Q. You are assistant collector of customs?

A. Yes, sir.

Q. And you were on January 28, 1926?

A. Yes, sir.

Q. And as assistant collector of customs you have power to examine and to search the person or baggage of a passenger, and you have power to take his statement either under oath or not under oath, have you not?

A. Yes, sir.

Redirect examination by Mr. MARTIN:

Q. How long, Mr. Walsh, was it after this key was taken from Mr. Ritterman before you learned the diamonds had been discovered?

70 BARNES. That is objected to; it is merely repetition; it has been stated once before; this is too obviously an effort to get a different answer.

COURT. If you expect a different answer, you may ask it.

MARTIN. I wanted to be sure the collector understood.

COURT. All right; tell him again.

Q. How long after Mr. Flynn obtained the key before you learned the diamonds had been discovered?

A. I should think seven or eight minutes; something like that.

Q. Did Mr. Ritterman at any time before the key was obtained from him say anything about there was diamonds in his bag?

A. No; he denied it up to that time.

Recross examination by Mr. BARNES:

Q. How do you fix that seven or eight minute interval, from the time Mr. Ritterman said, "I have not the diamonds on my person; they are in my bag," or from the time he first told you he wanted to speak to you privately?

A. Well, I understood the assistant district attorney's question to be how long from the time the key was procured until I learned the diamonds were discovered. Is that right?

Q. Is that what you understood?

A. That's what I understood the district attorney's question.

Q. Now, let me ask you another question. Mr. Walsh, isn't it a fact that as soon as they came in and asked Ritterman for

71 this key he then said he wanted to speak to you privately?

A. No, sir; he did not for several minutes, three or four or five, possibly.

Q. Three or four or five minutes?

A. Five, probably; after that he continued disrobing, or taking off his clothes.

72 JAMES J. FLYNN recalled by Government.

Direct examination by Mr. MARTIN:

Q. After you obtained the key from Mr. Ritterman how long was it, as near as you can remember, before you discovered that there was some diamonds in the Gladstone bag?

A. As soon as we could unlock the bag.

Cross-examination by Mr. BARNES:

Q. And the bag was in a different room from Mr. Ritterman?

COURT. How does it make any difference how long it was, whether it was five minutes or ten minutes or thirty minutes?

BARNES. Not if it was before, not if he disclosed it before they found it. They didn't find it on a search; the man told them it was there.

COURT. But what difference does it make whether it was five minutes, ten minutes, or seven minutes?

BARNES. As long as it was some time.

STEELE. During the examination.

73 G. E. BINGHAM recalled by Government.

Direct examination by Mr. MARTIN:

Q. Did Mr. Walsh call you into the room from where he was making an examination of Mr. Ritterman?

A. He did.

Q. And did you hear Mr. Walsh ask Mr. Ritterman to repeat something?

BARNES. I object to this, recalling a witness and leading him, almost the exact words.

COURT. Not the slightest harm being done here.

BARNES. May we have an exception?

COURT. Yes; we are very generous with exceptions.

(Exception by defendant.)

Q. (Quest. read.)

A. I did.

Q. And what did Mr. Walsh ask him; what did Mr. Ritterman say?

A. Mr. Walsh asked Mr. Ritterman to repeat what he had previously said, and Mr. Ritterman replied, "I have nothing on my person; it is in the bag."

74 C. E. SAWYER, called by Government, sworn.

Direct examination by Mr. MARTIN:

Q. Your name, Mr. Sawyer?

A. C. E. Sawyer.

Q. What is your business?

A. Deputy collector of customs.

Q. And you are located at St. Albans, Vermont?

A. Yes.

Q. Whether you are the cashier of that department?

A. I am the cashier.

Q. On the morning of the 29th of January, the next morning after Mr. Ritterman, the defendant, was brought there, did Collector Whitbeill give you instructions as to the custody of the diamonds?

A. He did.

Q. That was after they had been examined by Mr. Orton and Mr. Armstrong for purposes of appraisal?

A. Yes, sir.

Q. You say them after they were sealed up; after they made their appraisal?

A. I witnessed the sealing of them.

Q. You witnessed the sealing, and after they were sealed they were in your custody?

A. Yes, sir.
Q. By order of the collector?
A. Yes, sir.
Q. And have they been in your custody from that time?
A. Yes, sir.
Q. Except perhaps some that were brought——
Q. COURT. Never mind the exception. Have you got them now?
A. They are on the table.
MARTIN. I would like to show where they have been keeping them.

75 COURT. No; we don't care where they have kept them; you are trying this case too fine, gentlemen.

Q. MARTIN. Will you open up the package so that we can see some of those diamonds?
COURT. Do you want the jurymen to see them?
MARTIN. Yes.
COURT. Now let the jurymen step right up and see them; we won't pass those around any. You guard them there, Mr. Sawyer. The lawyers all get away, marshals all get away. You may say, marshal? to the witnesses who have testified that they may remain in the room. Do you care about any witnesses being excluded?
BARNES. No.
COURT. This order for the witnesses to be excluded is now revoked; they may come in.
(Jury inspects diamonds on table.)

76 CHARLES L. ORTON, previously sworn, called by Government.

Direct examination by Mr. MARTIN:

Q. Your name is Orton?
A. Yes, sir.
Q. What are your initials?
A. Charles L.
Q. You are connected with the United States customs?
A. At St. Albans.
Q. What are your duties there?
COURT. Come right to the question.
Q. You have the appraising of the property which is seized?
A. I do.
Q. And did you appraise the diamonds in question?
A. I did, sir.
Q. And did you find the weights of all of them?
A. Not of all of them.
Q. And were the weights marked on the packages?
A. They were.
Q. You weighed some of them?
A. We weighed some of them.
Q. And they checked up with the weights, they were the same as those marked on the packages?

A. Exactly.
Q. What was the total weight you made of all the diamonds?
A. We made 1,022.85 carats.
Q. What valuation did you place on them?
A. United States valuation of $122,492.43.
Q. What would be the Canadian valuation?
A. Figuring 20 per cent less, it would be $102,077.03.
77 Q. That would leave the duties on these diamonds how much?
A. At 20 per cent, $20,415.40.
Q. And the duties on these were 20 per cent?
A. The duties were 20 per cent.
Q. Did you have some one assist you in making the valuation?
A. I did.
Q. Who was that?
A. Mr. M. D. Armstrong.
Q. He is a jeweller at St. Albans?
A. He is.

Cross-examination by Mr. BARNES:

Q. Mr. Orton, you didn't happen to be on this tour that they took up to Canada and back that night, did you?
A. I did not.

78 M. D. ARMSTRONG, called by Government, previously sworn.

Direct examination by Mr. MARTIN:

Q. Your name, Mr. Armstrong?
A. M. D.
Q. You are a jeweler at St. Albans?
A. Yes.
Q. Have been for how long?
A. Twenty years.
Q. And during that twenty years you have bought and sold diamonds?
A. Yes, sir.
Q. And have placed a valuation upon them?
A. Yes, sir.
Q. And you know the value of diamonds?
A. Yes, sir.
Q. On or about the 29th of last January were you called into the customs office at St. Albans by the collector to assist Mr. Orton in making the appraisal of certain diamonds?
A. Yes, sir.
Q. And you assisted Mr. Orton in weighing them up?
A. Yes, sir.
Q. Mr. Orton took the figures?
A. Yes.

79 ERNEST R. HARVEY, called by Government, sworn.

Direct examination by Mr. MARTIN:

Q. Your name is Ernest R. Harvey?

A. Yes.

Q. You are a deputy collector and inspector of customs?

A. I am.

Q. Located at St. Albans?

A. Yes.

Q. Were you there on the night Mr. Ritterman was brought into the customs office?

A. I was.

Q. And did you hear some conversation between Collector Whitehill and Mr. Ritterman?

A. I did.

Q. You may tell what that conversation was.

A. Mr. Whitehill questioned him in regard to his name and address and then asked him if he had any merchandise to declare, and he answered "No." He repeated the question by saying "Are you sure that you have nothing to declare?" And still the answer was "No"; and then he says, "Are you sure that you have no diamonds to declare?" And he denied it.

Q. Did you obtain from Mr. Ritterman a baggage check?

A. I did.

Q. Have you that baggage check with you?

A. I have.

BARNES. Now, I object to the offer of that baggage check in evidence unless it be shown where it came from and under what circumstances.

COURT. He says he obtained it from the defendant.

BARNES. Took it away from him; that is why I am objecting to it.

80 MARTIN. What evidence is there he took it away from him?

BARNES. If it isn't so, ask him. I submit there has been no basis laid for it, that he received it, he, a Government officer. Your honor is as familiar as anyone in the United States with the law of search and seizure, and this comes pretty close to it.

COURT. You don't claim but what a customs officer has a right to search anyone coming over the line, do you?

BARNES. Well, he didn't take it under those circumstances, and no foundation has been laid.

COURT. There certainly hasn't been anything to show he got it illegally.

BARNES. May I cross examine him?

COURT. No; that isn't the way. Wait until he finishes his direct.

BARNES. It is too late to object then.

COURT. No; I will take care of you; no wrong is going to be done your client.

Q. I show you Gov. Ex. 5, and ask you if that is the check you received from Mr. Ritterman?

A. It is.

Q. And where was he when you received it?

A. In the jail at St. Albans.

Q. Did you ask him for it?

A. I did.

Q. Did he hand it to you?

A. He did.

Q. Did you examine it with the baggage check on this Gladstone bag, Gov. Ex. No. 2?

A. I did.

Q. Whether or not this is a duplicate check?

A. It is a duplicate check to the one on the bag.

81 Q. Did Mr. Ritterman ask for some things out of this bag?

A. He did.

Q. And did you get them for him?

A. I did.

Q. Take them up to the jail?

A. Yes.

Q. And did he receive them?

A. He did.

Cross-examination by Mr. BARNES:

Q. You were so kind to Mr. Ritterman when you put him in jail, what did you tell him when you got this baggage check from him? A. He was in jail then under arrest, wasn't he?

A. He was.

Q. And you were the Government officer and one of those who had interrogated him the night before?

A. I witnessed an interrogation; I didn't interrogate him.

Q. And you came up there and told him you wanted that baggage check?

A. I asked him if he had it.

Q. Did you say, "Please, Mr. Ritterman, give it to me," or did you say, "Give me that baggage check"?

A. No; I asked him if he had it.

Q. Yes; and what did he say?

A. He said "Yes"; I asked him if he would give it to me, and he handed it over.

Q. Did you say, "Please, Mr. Ritterman, give me that baggage check," or did you take it the way the customs officers usually take it?

A. I don't remember using the word "please," but I don't think I was overbearing in my manner.

82 Q. Did you say, "Give me that check"?

A. No; I asked him if he would give it to me.

Q. If he would give it to you. Why were you so unusually and extraordinarily polite on that occasion?

A. Because I didn't need to be otherwise.

Q. You know he had to give it to you whether you asked him one way or the other, didn't you?

A. I didn't know that.

Q. Now, Mr. Harvey, were you present on this excursion that came down from Montreal on the night of January 28th?

A. No; I was not.

Q. You weren't a member of that St. Albans Hunt Club?

A. No.

MARTIN. I wish to offer all the exhibits.

COURT. All been admitted.

BARNES. I want to renew my objection to the last one on the same ground.

COURT. Yes. What is that ground?

BARNES. On the ground that this was taken from this defendant while he was under arrest, subject to the control of these Government officers, and that it is evidence against him, to be used against him in a criminal case.

COURT. He gave it up voluntarily; he said, "Will you let me have it, will you give it to me?" And he handed it over.

83 BARNES. But if your honor please, a man doesn't do—and I think your honor can take judicial notice of the fact that a man doesn't do things voluntarily, doesn't do anything voluntarily when he is in jail charged with a crime; he does what he is told.

COURT. I wouldn't quite agree with you that I should take judicial notice of the fact that everything he does while he is in jail is under coercion. The evidence here is that there was no coercion about it. The evidence is that he gave it up voluntarily, but you take your exception to the ruling; that will preserve any rights the defendants may have.

(Exception by defendant.)

COURT (to jury). You come in to-morrow morning, gentlemen, at nine o'clock. In the meantime don't go discussing this case, even between yourselves. It is a good deal better not to.

(Adjournment.)

84 9.20 A. M., MARCH 11, 1926.

Motion for a directed verdict

Now comes the defendant, by his attorneys, at the close of all the evidence, and moves this honorable court to order and direct the jury in said cause to return a verdict of not guilty for the following reasons:

1. Because there is a variance between the allegation as contained in the first count of the indictment upon which the case is to be submitted to them and the evidence, in that the defendant is charged in said count with the clandestine introduction and smuggling of

the diamonds mentioned in said count at Highgate, in said district, when said Highgate is not the first port of entry at which the defendant was required to make declaration and pay the duties on said merchandise, and because there is no evidence in the record that there was any smuggling or clandestine introduction or failure to make declaration, or any failure to enter or invoice or account for duties at Highgate.

2. Because said count does not allege that the defendant smuggled and clandestinely introduced, for the purpose of evading duty on said merchandise, at the port of St. Albans, Vermont, which is the first port of entry by railroad according to the evidence at which the duty on said merchandise could have been assessed, paid, or accounted for.

85 *Colloquy between court and counsel*

COURT. You want the court to submit this case on more than one count?

BARNES. I didn't understand so; no, sir; I directed that motion to count No. 1, and I ask for the direction of a verdict on count 6——

COURT. Of course it makes a difference what count of the indictment it goes to the jury on.

BARNES. I ask for the direction of a verdict on counts 2, 3, 4, 5, 6, 7, and 8 in addition to the one covered by the written motion.

COURT. I think that the allegation in that count is that he brought the goods in at Highgate. Isn't that the evidence, that Highgate is the first town they come into?

BARNES. The indictment reads——

COURT. Isn't that the evidence? Isn't Highgate the first town the train passes through after leaving Canada?

BARNES. That is correct, as a matter of fact, but there is nothing in the evidence covering the point.

COURT. Well, put on a witness then, and prove that.

MARTIN. If your honor please, I think there was one of the witnesses, I think Mr. Fuller, testified that Highgate was the first town this side of the line. Count 3 is like count 1, with the exception that count 3 states that he smuggled at Highgate, Swanton, and St. Albans.

COURT. We will submit it then on count 1 and count 3. The allegation here is that on the 28th day of January, at Highgate, in the county of Franklin and State and judicial district of Vermont, within the jurisdiction of this district, did then and there unlawfully and knowingly, with intent to evade the payment of certain duties on certain merchandise subject to the duties of the United States, and thereby defraud the United States and the revenue thereof, smuggle and introduce into the United States from
86 a foreign country, to wit, the Dominion of Canada, etc. That is where he did it, brought them across at Highgate. Now 3, at the town of Highgate, and at the city of St. Albans, did know-

ingly and feloniously, etc., and with intent to evade the duties. Well, I will submit it on count 3 instead of count 1 then.

MARTIN. I would like to clear this up; I would like to put on a witness.

COURT. You may.

BARNES. May I have an objection noted to taking any testimony subsequent to the rest?

COURT. What is the objection?

BARNES. On the ground both sides have rested.

COURT. Doesn't the court have the right to let the parties withdraw their rest? Isn't it done continually, almost every day?

BARNES. Yes; but mostly under objection.

COURT. Of course you can have an objection and exception.

(Exception by defendant.)

87 W. R. H. DAVIDSON, called by Government, sworn.

Direct examination by Mr. MARTIN:

Q. Your name is W. R. H. Davidson?

A. Yes, sir.

Q. And you live at St. Albans, Vermont?

A. Yes.

Q. And you are in the customs service?

A. Yes.

Q. What position do you hold in the customs service?

A. Inspector.

Q. How long have you held that position?

COURT. Come right down to the point. Does Highgate join Canada? That is all we want to know here.

Q. In coming on the Washingtonian from Montreal to St. Albans what towns do you have to pass through?

A. Highgate and Swanton.

Q. Is Highgate the first town you come into after coming over from Canada, crossing the line?

A. Yes, sir.

Cross-examination by Mr. BARNES:

Q. Is Highgate a port of entry?

A. It is a part of the port of St. Albans.

Q. So is the—

A. Town of Highgate.

Q. So is the township included within the limites of the collection district No. 2. Is that true?

A. Yes.

Q. Does this train of which you speak stop at Highgate?

A. Not as a rule; it is not scheduled to stop.

Q. How far is Highgate from the Canadian line, approximately?

A. The town of Highgate goes right to the Canadian line.

88 Q. The township?

A. The town, as we call it.

Q. But the railroad station where the customs house or customs office used to be at Highgate is about three miles from the Canadian line, isn't it?

A. I didn't know there was any customs house there.

COURT. What do we care about where it used to be?

Q. It was once a port of entry, was it not?

COURT. How is that material, what has happened in the past?

A. I don't know.

Colloquy between court and counsel

COURT. We aren't interested in the history of the district.

BARNES. Because of the fact that the port of entry, the port of Highgate, was abolished by an Executive order in 1923.

COURT. Supposing it was; supposing it was abolished ten years ago, we are not concerned about the history of the district.

BARNES. No; but I asked the witness this question for the purpose of showing that it was the first place where anyone could possibly make an entry, even under the old law, three miles from the Canadian border, with the object of calling your honor's attention to the fact that every bit of that way a man might be held guilty of the crime, even though it was impossible for him to pay duty to anyone.

COURT. No; he couldn't be held guilty of the crime if he didn't bring anything in intending to defraud the revenue; that is the trouble with that.

BARNES. That is quite true.

COURT. If he comes over with an honest intention, there isn't any danger of his being held guilty of committing a crime.

89 BARNES. But the Supreme Court has held that he may change his mind at any time before the obligation to pay the duties arises without being guilty of the crime of smuggling.

MARTIN. If it please your honor, I ask that the case be submitted on count 3.

COURT. Yes; I will submit it on count 3.

BARNES. May I then be heard on count 3?

COURT. Certainly.

BARNES. The memorandum, or rather the motion, which I have handed your honor has no application to the present motion, so I respectfully move the court that the direction of a verdict of acquittal be made on count 3 of the indictment, on the ground of a material variance between the allegation and the proof.

Count 3 charges the so-called old-fashioned crime of smuggling.

COURT. Is there any new-fashioned crime of smuggling?

BARNES. The style seems to change; that is all.

COURT. I don't think so.

BARNES. Smuggling has been held to be the actual passage of dutiable goods through the lines of the customs house without paying or securing the duties thereon.

COURT. You say there is a variance. What is the variance?

BARNES. The variance consists in this, that the Supreme Court and the Circuit Court of Appeals in this Second Circuit have both held that where a man, even though the surrounding facts tend to make one believe that he intended to evade the payment of duty arises, he declares—he changes his mind and declares that he has dutiable merchandise, then in such the Supreme Court has said there can be no crime of smuggling.

90 COURT. But the Supreme Court hasn't announced any doctrine to the effect that if a man goes into the collector's office and says he hasn't any diamonds and tells him that three times, and the customs officers begin to search him and get off part of his clothes, and then he changes his mind and says he has got some diamonds somewhere—the Supreme Court hasn't said that that isn't a crime, has it?

BARNES. But the Circuit Court of Appeals in the Second Circuit, in the case of United States vs. One Pearl Chain, has said that very thing. In that case a woman brought a pearl necklace into New York——

COURT. In that case the woman had her pearl necklace on board ship all the time.

BARNES. In that case she had it on her person all the time.

COURT. She went back on board ship to take it off her person.

BARNES. After she had three times denied she had it, and the court said in spite of that fact she had an opportunity to change her mind.

COURT. That was a civil case for the forfeiture of the necklace, but not a criminal case for smuggling.

BARNES. But the court in that case referred to that and called the crime smuggling.

COURT. Well, it would be smuggling in a civil case, be the same name.

BARNES. And it has also been held that if on examination of passenger's baggage dutiable articles were found concealed in clothing it would not justify the conclusion that the owner of the baggage had intended to evade the payment of duty.

COURT. That is right; he might have something in his baggage that he didn't know about, so it would not be wilful importation; it would not be a knowing importation. In order to commit

91 this offense, the person must cross the line knowing that he has the diamonds. He must cross the line wilfully; that means brings the diamonds in wilfully, knowingly, purposely, as contradistinguished from inadvertently or accidentally.

BARNES. Yes, your honor; but in every single one of these cases in the books where it was held that he was not guilty of that crime until the obligation to pay or account for duties had come, in every one of those cases——

COURT. The obligation to pay arises before they get him completely stripped; they don't have to go on and get all his clothing

off from him and keep him any length of time and give him a change to change his mind then.

BARNES. The fact remains that the testimony in this case shows that they had not completed their examination.

COURT. All right.

BARNES. Now up to the time they had completed their examination the entry was not all finished, because the department has ruled under the law that an entry is the entire series of transactions having to do——

COURT. When, under your theory, would the opportunity come to an end?

BARNES. It comes to an end under my theory, under the theory of the cases that I wish to cite to your honor, at the time that the entry is concluded.

COURT. When after they start in searching him and stripping him. How far have they got to go before he has completed the offense?

BARNES. Until they either find the goods themselves without a declaration on the part of the passenger or until they deliver the goods to the passenger and tell him to go on his way.

COURT. Then if a person comes in at Highgate, for instance, and he has twenty-five trunks, and the customs officers take those twenty-five trunks and after they take him to the customs house they take the trunks to the customs house, and he tells them repeatedly that he hadn't any diamonds, he hasn't anything that he wishes to declare, and they start in and they search the twenty-five trunks, they spend two days searching the twenty-five trunks, and they *then* get around where they begin to strip him and search him, and then he says, "Now, wait a moment: I have got these diamonds and I am going to declare them, and I am ready to pay the duty: I have got the money right here." Do you maintain he is innocent?

BARNES. I do.

COURT. We disagree on that.

BARNES. On that point in the Keck case the rule was laid down, and in this One Pearl Chain case, before the Circuit Court of Appeals for this circuit, the rule of the Keck case was approved and the doctrine applied to a case of just what your honor speaks of.

COURT. Then, according to your theory, to commit the offense of smuggling they would have to search those 25 trunks, they would have to search him, and if he announced just before they were reaching into the right place to get the diamonds that he had got the diamonds and was ready to pay the duty he has committed no offense.

BARNES. He has not. Now, even the doctrine of the strongest case against my position, that of the Newman case, in which your honor ruled in New York, in the Southern District of New York, in which your honor's opinion was affirmed in the Circuit Court of Appeals, in that case that man declared three times that he didn't have it at

all, and he continued to declare he didn't have it until the inspectors actually found it in his pocket. Now, on all the cases there is a sharp line of demarcation drawn between guilt and innocence under this charge, guilt and innocence being separated by the intention of the party, the changing of his mind way up to the time the Government either releases the goods to him or finds the goods, or
93 the inspectors find the goods on his person or in his baggage.

COURT. Now, let's see if that is so. In the Newman case the man came from the ship on shore, but he had not passed beyond the customs lines except temporarily, when he was shadowed by a customs officer, and he immediately returned, and he did tell them that he didn't have any diamonds several times, but the customs officer says, "Now we want to give you a fair chance; we are going to search you unless you make a declaration; we will give you a chance again to make a declaration of the diamonds or of anything that you purchased abroad," and they defended that case on the theory that he hadn't gone beyond the custom lines. Down there at the ship they have the customs lines marked off, a kind of a line drawn; I don't know whether a fence or a rope or what not, but the customs lines are well established. The Circuit Court of Appeals said that to say that that man hadn't committed the offense because he gave them up, gave up the diamonds before the search actually began, the Circuit Court said, "Such a construction would make a mockery of the statute and render it in a large measure useless."

BARNES. They were referring, if your honor please, to the leaving of the customs lines and not to the examination when they said that.

COURT. They were referring to all the facts and circumstances in that case, and the defense that was made that he had not committed the offense because he had not passed beyond the customs lines.

BARNES. And they distinguished that from the Keck case on the question of passing beyond the customs lines.

COURT. I should say this Newman case wasn't a stronger one than the Keck case.

BARNES. No; because in the Newman case he never declared, never made any declaration, never gave any evidence of any intent.

COURT. He gave evidence of good intent when he asked
94 them if they would give him immunity if he would produce the diamonds; that was a good intention.

BARNES. Immunity? He may have, but they didn't take advantage of it.

COURT. They didn't trade with him; he wanted to, but the customs officers wouldn't accept his offer.

BARNES. The record doesn't show he offered.

COURT. Certainly; he said after he had all this talk, shortly after the pen was broken up by Roberts and seven diamonds were found in it, O'Connor asked Newman whether he had anything else on his person which he had failed to declare. Newman then asked if he made a clean breast of it whether immunity would be granted, to which O'Connor answered in the negative, saying he had no

authority; thereupon they continued the search and they found two or three diamonds in a tube of tooth paste.

BARNES. Now in the Newman case he did not make a declaration, he did not say anything, he never gave the customs officers any idea of any change of heart, any change of his mind about the business of smuggling. He proceeded clear through to the passage which your honor has read with the intent, and carried the intent out, until the customs officers found this merchandise. Now in the present case, your honor, this man never had a chance to declare that bag. That may sound strange, but let me explain what I mean by it.

COURT. It certainly does sound strange.

BARNES. Let me explain what I mean by it. That bag was corded and sealed in Montreal. This man hadn't a chance—this inspector up there went through it, corded and sealed it up through to St. Albans under the regulations. At no time after this passenger crossed the line into the United States until he got to the customs house at St. Albans could he possibly have declared or made an entry of that bag, and the regulations and the law provide that such an entry shall be made at the first port of entry, and St. 95 Albans is the first port of entry, the first place that he could have that merchandise appraised and pay the duty. And when he got to St. Albans did he have the chance to touch that bag? He was taken away from there to the customs house and from the customs house to the jail, and he never saw that bag again.

COURT. Supposing the jury should believe what Mr. Whitehill testified to, that he asked him three times, and then suppose the jury should believe what Mr. Walsh testified to, that he asked him and he said he had nothing to declare?

BARNES. And that is exactly what was done in the pearl chain case; they asked her three times.

COURT. You said he had no opportunity to declare. Couldn't he have told the truth to Whitehill? Couldn't he have told the truth to Mr. Walsh? Couldn't he have told it to the customs officer on the train?

BARNES. Yes.

COURT. All right.

BARNES. But up to the time that that bag was borne in there he hadn't any chance to pay the duty, declare it, or anything else. They were not talking to him about his bag. They were talking to him about what he had on his person and in this little handbag.

COURT. No; they were asking him if he had anything to declare, and they *they* finally asked him. I think the last question was, if he had any diamonds to declare.

BARNES. Now, the reason that I am pressing, and perhaps boring your honor with one point in this case——

COURT. No; you are not boring me in the least; it is quite entertaining.

BARNES. I thank you. Article 1001 of the customs regulations contains what I believe is the expression not only of judicial

96 determination of this question but of the acceptance of that question by the Treasury Department when it says, relating to the examination of baggage, "But under no circumstances will an amendment to the declaration be permitted so as to include articles previously found by the inspectors."

COURT. That is a regulation.

BARNES. Yes; meaning that the examination, that the entry as defined in the regulations to be the act of passing through the customs house, has not been completed, and that they do not consider it complete until either articles are found by the inspectors or the merchandise is redelivered to the passenger, and that is correct. Now, on the first of those points I wish to call the court's attention to article 965 of the regulations, which says the term "entry" has two meanings: First, the document filed at the custom house; that is, as your honor knows, in the case of merchandise coming in shops and not as passengers' baggage; and second, the transaction of passing merchandise through the custom house. And then the date of the entry in the second sense is the date when the custody of the Government ceases on imported merchandise. The Treasury Department, the Secretary of the Treasury, under the right given him by this law under which this indictment is drawn, has made a regulation which has the force and effect of law, and in that regulation he has defined when this act of entry shall cease. He said that it is when the custody of the Government ceases, and in this other regulation, 1001, it says in effect that it shall continue until the articles be found by the inspector. Now, between those two is what is called a customs entry, whether it be by invoice, a formal entry off a ship, or whether it be by oral declaration, an informal entry, crossing the Canadian border, and we respectfully submit that as long as that act of entry is continuing just so long does a passenger have the right to in effect amend his entry, because that is what it is, amend his entry by changing his mind and declaring the existence of merchandise which the Government says is dutiable.

97 Now, if that where not so, if your honor can conceive of the situation where a passenger arrives on the train and brings with him into the territorial limits of the United States merchandise which is dutiable, the minute he crosses the line, three miles north of the Highgate Station, he is just as much a smuggler, he is just as guilty of the criminal act, as Newman when he went through the whole performance without saying a word about what he had with him until it was found, because there isn't any place along that border where this train goes where a man can possibly make such a declaration, either oral or written, until he comes to the port of St. Albans. At that first port of entry his duty for the first time arises. And what happened in this case when that duty did arise? These extraneous questions asked on the train, and the answers given, under the Keck case haven't any weight because up to the time the obligation to pay the duty accrued; what he said

to anybody else or what his intentions were, were for his own judgment, were for his own conscience.

COURT. What he said is some evidence of what was in his mind, if it is believed, isn't it?

BARNES. I do go far, your honor, as to grant that that is so in the majority of instances.

COURT. But not in this case?

BARNES. Perhaps lawyers are an exception.

COURT. I won't put them in the excepted class.

BARNES. But when he got to the port of St. Albans, the first place that he could make such an entry, what did he do? He didn't do anything. He didn't have a chance to do anything. He was taken off the train to the customhouse, to the jail—a continuous performance. And in the course of that performance the one and only time when anything was said to him about the baggage which had been cored and sealed by the Government for delivery at St. Albans, and over which he had lost the physical control, the first time that anything was said to him about that bag, he voluntarily delivered the key, and within a reasonable time afterward said, "My diamonds are in that bag," or "The diamonds
98 are in that bag," or whatever he said at that time. That was, without any doubt, on the evidence, prior to the time when those diamonds were discovered by the inspector. I don't think that a reasonable man can have a doubt on that question. Now, under the Keck case, and under this pearl-chain case, and under a later case, at that moment when he declared to these inspectors that he had the diamonds in his bag the obligation to pay duty had not even accrued. The obligation to pay that duty can not accrue at that particular stage of the game, because there has been neither an entry nor a seizure, and at that time, and before this obligation to pay the duty accrued, he followed unconsciously, unintentionally perhaps, but nevertheless sincerely and thoroughly, the doctrine which the Supreme Court of the United States has laid down in the Keck case, and almost identical with the facts to which that doctrine was applied in the One Pearl Chain case. Now ignorance of the law excuses no man. But shall we go so far as to say that if this man had known what the law holds and had proceeded in a direct and intentional effort to comply with the law as stated in the Keck case and One Pearl Chain case—if he had read those cases before he came across the border and had stayed right within the rule negotiated therein—couldn't we then say, or should we then say, "He has got the knowledge of the law which is presumed, and he did an act which the Supreme Court said was all right"? We can't take one side of that proposition and discard the other. On the law as it stands to-day, the Keck case not having been modified but rather approved; the One Pearl Chain case not having been overruled but rather having been approved; and finally the case of United States vs. Craig, in the 2nd volume of the second edition of the Federal

Reporter—1st volume, second edition, page 480, one of the most recent cases which we have had—in which the court said: "The word 'smuggle' connotes the unlawful entry of goods contrary to law, but it must nevertheless be conceded that there may be acts of omission or commission which have a distinct tendency thereto without a person being guilty of this particular offense."

99 COURT. Under your philosophy of the law you say that a person has got a right to come over the line and falsify to the customs officers when he meets them on the train, the collector himself, the deputy collector, got a right to go on and deny that he has any goods subject to duty, and got a right to stand up and allow them to begin to search, providing he admits that he has the goods just before the officers place their hands on them he is innocent

BARNES. Not before they place their hands on them; I don't go that far.

COURT. How far do you go?

BARNES. To the extent of saying that I agree with your honor's statement; that is my theory, that is the theory of the law except for one fact.

COURT. What?

BARNES. That the entry of this merchandise must not have been completed by the finding of the dutiable merchandise by the customs inspector. I should say that the minute the customs inspector finds it the crime has been committed.

COURT. If he had the diamonds in the shoe on his left foot, and they strip his person entirely, shoes and stockings off from his right foot, and when the man reaches down to take off the shoe on his left foot he says, "Wait a minute now, I have got some diamonds there and I am going to pay," no offense has been committed?

BARNES. No offense has been committed.

COURT. I won't agree with that philosophy.

BARNES. And in this case your honor has drawn that philosophy as near an impossibility as your honor can draw it, but the practical side of it is that the application to this case is not so finely drawn as that.

COURT. They got him partly stripped, according to the evidence of the Government officer, pretty well stripped.

100 BARNES. The object of making an entry is to appraise the customs officers of the fact that you have something with you. Now can anybody by the wildest stretch of the imagination say that all these customs officers did not know that he had this bag with him? They knew it from the time he got on the train.

COURT. They were suspicious of it, they said; they didn't actually know it.

BARNES. But they knew he had the bag. Therefore that is equivalent to having declared one Gladstone bag, for legal purposes; they knew it, they were appraised of it, and they have admitted that they were. Now the contents of that bag—as was said in the case in which the other decision was rendered, because it was found by the

customs inspectors that when the examination finished and he still had these emeralds in his bag without having admitted it the crime of smuggling was complete, but up to the time dutiable merchandise is discovered by the customs officers, or until the Government says, "I am through with you, here are your goods, go along," there is no completion of the entry, and within that period a man may change his mind, or if he may not I respectfully submit that there is no place where the Keck case can be applied. If a man can change his mind after the customs inspector asks him once, why can't he change his mind after they have asked him five times?

The court in this necklace case said he could change his mind or her mind after she had been asked three times about a pearl necklace, and had denied it and had said it was made in New York and had said she didn't get it in Paris, and all those things. Three times there. Now where is the doctrine of the Keck case to end and where does this crime begin? After a customs inspector asks you once or after two of them ask you or three of them or four of them, or shall it be the logical point they have placed in the discovery by the customs officers of dutiable merchandise without the assistance and active cooperation of the passenger to that end? Certainly if this man were charged with murder, with a crime of that character, they could testify that he carried a hatchet around with him
101 for a month and sharpened it up, but if he put it against somebody's neck and then took it away he certainly wasn't guilty of *m*order. Whatever this man may have done up to the time when he had to make this payment of duty, or the declaration, has no bearing in this case whatever. If we are to deny a man the right to change his mind, the right to repent, then what is the use in having laws?

COURT. Now, as to your pearl-necklace case, the courts say: "She brought it in on her person under cover, as it would have been brought in in a trunk under cover from the ship to the customs territory on the pier, making no effort so far as the proof shows to remove it beyond the *as the proof shows to remove it beyond the* customs lines." The customs lines there is a territory set apart for the examination of baggage, taking declarations, and paying the duties, etc. "This under the Keck case could not be held to be smuggling, even if it was done secretly. But how can she be said to have secretly introduced it when before bringing it ashore she gave to the customs officers a written declaration which in effect said to them, 'I have in my baggage and on my person wearing apparel including jewelry which I purchased abroad'"?

BARNES. I imagine I understand why your honor has called that to my attention, because your honor has in his mind the fact that the minute he enters the collection district of St. Albans he has then come or brought himself within the customs lines, but the same as in the other one, if it were to be followed to its logical conclusion it would mean that the minute he crossed the border in a train going 50 miles an hour, where he could not stop it to save

his soul, he has nevertheless guilty, the first place he touched this side of the line. It is the first available place.

COURT. Now you are asking me to direct this jury to return a verdict of not guilty and the evidence is that this man told the customs officials on the train that he had no goods to declare;
102 the evidence is that he told Mr. Whitehill three times that he hadn't anythin*f*, and he told Mr. Walsh three times that he hadn't any, and you are asking me to direct a verdict of not guilty because you say that the time had not arrived when he did not have the right to change his mind. Got him pretty well stripped before he changed his mind.

BARNES. But not finished.

COURT. Not finished?

BARNES. No.

COURT. Mr. Whitehill says he still had some apparel on.

BARNES. And he still had this bag which nobody had touched.

COURT. They had taken the key from him.

BARNES. No; he gave it to them.

COURT. Well, they had got possession of the key, and the man had started with the key toward the Gladstone bag.

BARNES. Yes.

COURT. Well, have you any more you want to say to me on that point?

BARNES. No; not on that point.

COURT. Very well; motion denied.

(Exception by defendant.)

* * * * * * *

(Arguments by counsel.)

103 *Defendant's requested instructions to jury.*

1. If any evidence in the case permits or is susceptible of two constructions than the one most favorable to the defendant must be taken.

2. No unfavorable inference can be drawn from the failure of the defendant to take the stand and testify.

3. Each and every allegation of the indictment must be proved beyond a reasonable doubt.

4. If the defendant here intended to smuggle the merchandise in question, he had an opportunity to change his mind up to the time when the obligation to pay or account for the duties arose, and if you believe that the defendant did so change his mind, and did so declare, then it is your duty to acquit him.

5. If the jury find as a fact that defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him, and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed, if they then believed that he availed himself of the opportunity then the verdict should be not guilty.

6. If, from all the evidence, the jury is satisfied by the required measure of proof as indicated that at some time, either before
104 or during the trip from Montreal to St. Albans, the defendant inten'ed to smuggle the diamonds into the United States for the purpose of evading the duties thereon, still, if the jury are satisfied from the evidence that he at any time during the examination of his baggage, and before the discovery of the diamonds by the customs officers, changed his mind and directed or told the officers where the diamonds were and delivered to said officers the key to the bag containing said diamonds, then he is not guilty of the crime charged.

7. If the jury find that there was a change on the part of the defendant from an intent to commit the crime of smuggling to an intent to declare the diamonds, then the jury must decide when the defendant had reasonable opportunity to act on such change or intent, and if the jury find that the defendant declared his possession of the diamonds within a reasonable time after such change or intent then he is not guilty of the crime charged.

8. The jury may consider the various witnesses who have testified in this case in the light of any possible interest they may be deemed to have in the outcome of this prosecution and may determine the weight to be given to the testimony of such witnesses in the light of such possible interest.

9. If the jury find from the evidence that there was no in-
105 tent to defraud the United States, then it must find the defe'dant not guilty.

10. If the jury find there was no intent to defraud, which continued throughout the transaction of passing the good' through the customs, then it should find him not guilty.

106 *Charge to jury*

Gentlemen of the jury: The third count of the indictment is the only count submitted to you. The other counts in the indictment are withdrawn from your consideration.

Did the defendant knowingly and wilfully, and with intent to defraud the revenue of the United States, smuggle the diamonds into the United States? If he did, you will find him guilty. If he did not, you will find him not guilty. Wilfully means purposely; smuggle means to convey secretly.

If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag.

The defendant requests the court to charge you and I do charge you as follows:

If the defendant intended to smuggle the merchandise in
107 question, he had an opportunity to change his mind up to the time when the obligation to pay or account for duties arose, and if you believe that the defendant did so change his mind and did so declare then it is your duty to find him not guilty.

If you find as a fact that the defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him, and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed; if you believe that he then availed himself of this opportunity then your verdict should be not guilty.

If you find from the evidence that there was no intent to defraud the United States, then you must find the defendant not guilty.

If you find that there was no intent to defraud, which continued throughout the transaction of passing the goods through the customs, then you should find him not guilty. Intent to defraud is one of the necessary elements of this offense. Now, the question is, Did the defendant knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle the diamonds into the United States? If he did, you will find him guilty; if he did not, you will find him not guilty.

With these other rules of law that I have given you there
108 are a few general rules of law that I must give you that you should follow in deciding these questions.

The first is the defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt. This presumption of innocense means that you should start in the trial of the case with the fact and the belief uppermost in your minds that the defendant is innocent and that fact and belief should continue with you until the Government introduces sufficient evidence to convince you of his guilt beyond a reasonable doubt. This is very old law and very sound law, and it is a sacred right which the law clothes everyone with, charged with committing offenses against the law of the land.

The fact that he has been indicated and placed on trial charged with the crime of smuggling must not be taken against him. No unfavorable inference can be drawn against a person because he is indicted for a crime and put on trial for that offense.

If you can reconcile the evidence in the case on any reasonable basis consistent with the defendant's innocense, you should do so, and in that case find him not guilty. This means if there are two theories in the case, each equally reasonable, one theory leading to innocence and the other theory leading to guilt, you should adopt the theory leading to innocence in tead of the theory leading
109 to guilt, because it is better and safer to believe good of a person rather than to believe evil of him, if you can do so on a basis consistent with reason and which is reasonable in view of all the evidence in the case.

The fact that the court has refused to direct his acquittal must not be taken against him. No unfavorable inference can be drawn

against a person because the court refuses to direct a jury to return a verdict of not guilty. All that means is that the court thinks it is a case to be decided by the jury instead of by the court.

You can not find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. A reasonable doubt does not mean beyond all doubt; it does not mean beyond a fancied doubt; but it means just what the words themselves imply, beyond a reasonable doubt, beyond such a doubt as a reasonable person would have after considering all the evidence in the case. If after an impartial consideration of all the evidence in the case, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt, and you should find him not guilty; but if after such impartial consideration of all the evidence in the case you have an abiding conviction of his guilt, such as you would be willing to act upon in important matters of your own, you have no reasonable doubt, and you should find him guilty.

110 The credibility of the witnesses and the weight to be given to their testimony are questions entirely for you to consider and decide. The law is that you are not bound to give the same credit or the same weight to the testimony of each witness; but you should give their testimony just such weight, just such credit, as you think it is fairly entitled to receive. Consider their appearance upon the stand, their candor or lack of candor, their feeling or bias, if any; their interest in the result of the trial, if any; their means of information, and the reasonableness of the testimony which they give, and believe as much or as little as you think you ought to. The fact that the defendant has not taken the stand and testified in his own behalf must not be taken against him. He may take the stand and testify or not as he sees fit, but in case the defendant does not take the stand it is the duty of the court to tell the jury emphatically that the fact that the defendant has not taken the stand and testified cannot be taken against him. No unfavorable inference can be drawn against a defendant because he does not take the stand and testify in his own behalf, and if you are satisfied beyond a reasonable doubt that the defendant is guilty of the offense of smuggling as defined by the court your verdict will be guilty; if

111 you are not satisfied beyond a reasonable doubt of the defendant's guilt your verdict will be not guilty.

Colloquy between court and counsel

COURT. You may enter an exception for the refusal of the court to charge in accordance with the defendant's 6th and 7th requests. I have complied with all others.

BARNES. I desire to take exception, if your honor will permit me, to your failure to charge according to the 6th and 7th requests.

COURT. Yes; I say to the 6th and 7th.

BARNES. And to the charge beginning, "If you find that the defendant falsely and fraudulently, intending to defraud the revenue

of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag."

COURT. What is the objection to that?

BARNES. I am making that more for record purposes.

COURT. I know; but if I have made a mistake or an error you ought to tell me so I can correct it.

BARNES. The same ground as I stated in my argument on the motion for a directed verdict.

COURT. I can't take any such general statement as that.

BARNES. If he told Collector Whitehill he didn't have any diamonds to declare, "at that time the offense of smuggling was complete."

COURT. "This completed the offense of smuggling." You say it did not complete the offense of smuggling?

112 BARNES. No, sir; in my opinion that is contrary to law.

COURT. All right; that is plain.

(Exception by defendant.)

COURT. Any suggestions by the district attorney?

MARTIN. No.

COURT. (to jury). Very well, gentlemen, this indictment is a long one; I hardly think you will need it, but if you do you may have it. The third count is the only one that is submitted to you. Take the case.

(Jury retire.

Adjournment.)

2:00 P. M.

Verdict

Jury returns a verdict of guilty.

Motion to set aside verdict

BARNES. If the court please, I desire to move to set aside the verdict and in arrest of judgment and ask the court on that point to hear me briefly on one point which I believe is material, affecting the sufficiency of the indictment under which this crime is charged.

COURT. All right.

BARNES. Count No. 3 of this indictment alleges that at Highgate, Swanton, and St. Albans the defendant did then and there unlawfully, wilfully, knowingly, and feloniously, with intent to evade payment, etc., but it fails in the words of the statute to charge that the defendant smuggled or clandestinely introduced into the

113 United States merchandise which should have been invoiced. In a recent case——

COURTS. Just a moment, please. [Reads count 3.]

BARNES. Now the allegation "which should have been invoiced" is one which forms a material element of the crime of smuggling, as charged in section 593. It is not the equivalent of an allegation that these goods were imported or smuggled and that they were goods which should have been invoiced, to say, as the indictment says, "without causing said diamonds to be invoiced for the purpose of ascertaining the duties on said merchandise."

COURT. But the law makes it necessary for them to invoice these diamonds, and it is not necessary to allege in an indictment matters of law. It wouldn't help the indictment any if they had that allegation that they should have been invoiced because the law makes that necessary, to invoice diamonds, and it is poor pleading to plead matters of law.

BARNES. Unfortunately, your honor, the law does not require the invoicing of passengers' baggage. Now I was of the opinion that you have just now expressed until Judge Hazel ruled otherwise in this case of United States v. Craig.

COURT. Is that a criminal case or a forfeiture case?

BARNES. It was a case of smuggling under two charges, under this paragraph or section 593, one on'y of which he discusses, but he discusses it in terms of the crime.

COURT. Was it for the forfeiture of some property?

AMEY. Habeas corpus case.

BARNES. The case arose on habeas corpus after a conviction and a sentence.

COURT. Can't you tell me whether it was a forfeiture or a criminal case?

BARNES. Not without looking at it.

COURT. Well, then, never mind; go on.

114 BARNES. Judge Hazel said in that case, United States v. Craig, decided in the western district of New York in August, 1924, and reported in the first volume of the second edition, Federal, 480: "There was a failure to charge that the Canadian ale was merchandise which should have been invoiced as provided by the statute. It was a necessary ingredient of the offense that the indictment should contain the specific omission or facts tending to show that the merchandise smuggled into the United States was of the designated class, and that it should have been invoiced. The bare allegation that defendants, with intent to defraud the United States, smuggled and clandestinely brought Canadian ale into this country to deprive the United States of customs duties was insufficient, and failed to charge the offense with precision and certainty. It failed to charge a material element of which the particular offense is composed. It is a general rule that no doubt is to be left in the mind of the accused of the particular character of the charge against him, and he must be fully and clearly apprised of its nature, and the record must disclose the exact offense, to the end——"

COURT. Those are general rules, as old as the hills; you don't need to spend any time on that.

BARNES. The words "which should have been invoiced," were not mere surplusage, for without them the descriptive facts constituting the illegal act would not have been properly set forth. Now, the allegation "without making an invoice," is not equivalent to an allegation that this merchandise should have been invoiced, because in this particular crime which is charged the tariff act, and the Secretary of the Treasury, by the rules and regulations promulgated by authority of the tariff act, state that first, in the words of the tariff act, "the Secretary of the Treasury shall have authority to prescribe rules and regulations" for various things, among which is, namely, merchandise on the person or included in the baggage of a passenger. Another section of the regulations, following section 498 of the tariff act of 1922, provides that consular invoices will not be required
115 for articles carried on the person or contained in the baggage of persons arriving in the United States. That is article 247 of the customs regulations of 1923. The only reference in the tariff act or in the regulations to invoices has to do with merchandise imported in the ordinary course of commercial business. This specific elimination of passengers' baggage from the necessity of invoicing therefore renders the statement in the third count in this indictment, that he brought this merchandise in without making an invoice, mere surplusage, because there was nothing in the law which required him to do it; but harking back again to the terms of the crime, as defined, it says in effect that only such merchandise which should have been invoiced shall constitute the crime of smuggling as defined by section 593.

COURT. The motion to set aside the verdict on the ground that it is against the evidence is denied.

As against the weight of the evidence, denied.

As contrary to law, denied.

Also upon objections and exceptions taken during the trial, denied.

And the exceptions to the charge of the court, denied.

And the rulings of the court on the requests to charge, denied.

The further motion in arrest of judgment on the ground that the indictment does not state facts sufficient to constitute the offense, denied.

And on the further ground that the verdict is contrary to the evidence, denied. I think it is strictly in accordance with the evidence.

And because it is contrary to law, denied. I think the verdict is strictly in accordance with the law.

To each of these rulings the defendant has an exception.

(Exceptions by defendant.)

116 MARTIN. I would like to move for sentence.

COURT. Enter judgment on the verdict. Now I will hear you on the sentence.

(Discussion as to sentence, notes 22 to 24.)

Sentence

COURT. You may enter that the defendant serve a term of a year and a day in the Federal penitentiary to commence from to-day.

Adjournment.

In chambers:

Defendant moved that the court admit him to bail pending a writ of error.

Motion denied.

Stipulation re bill of exceptions

It is hereby stipulated, consented, and agreed that the bill of exceptions as contained herein be settled as therein set forth.

Dated, Burlington, Vt., April 14, 1926.

ALLEN MARTIN,
Assistant United States Attorney.
BARNES, MCKENNA & HALSTEAD,
Attys. for defendant,
Plf. in error.

IN UNITED STATES DISTRICT COURT

Order settling bill of exceptions

This is certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and is hereby settled and allowed as the bill of exceptions herein and made a part of the record in this case.

Dated, Burlington, Vt., April 14, 1926.

HARLAND B. HOWE,
United States District Judge.

[File endorsement omitted.]

117 [Citation in usual form, showing service on Allen Martin, omitted in printing.]

118 In United States Circuit Court of Appeals, Second Circuit

THE UNITED STATES OF AMERICA, PLAINTIFF
against
LEIB RITTERMAN, DEFENDANT

Assignment of error

Now comes the said defendant, by his attorneys, and makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

1. The court erred in denying the defendant's motion to compel the Government to elect the charge upon which it would proceed.

2. The court erred in denying defendant's motion for a directed verdict:

(a) On the ground of variance between indictment and evidence.

(b) On the ground that it appears affirmatively that the defendant did not commit any crime as charged in the indictment or otherwise.

(c) On the ground that there was no legal evidence in the case upon which the defendant could be found guilty of the crime charged in the indictment.

3. The court erred in denying defendant's motions to set aside the verdict and in arrest of judgment on the ground:

(a) That the indictment did not state facts sufficient to constitute the offense purported to be charged.

(b) On the ground that there was no evidence adduced on the trial to sustain the verdict.

119 (c) That the verdict was contrary to the law.

(d) That the indictment does not charge any crime against the defendant.

4. The court erred in the admission of evidence offered by the Government in the following instances:

(a) In the testimony of E. M. Wright in substance as to all transactions and conversation with the defendant in Montreal.

(b) In the testimony of Willis E. Fuller in substance as to all conversations and transactions with the defendant on the train from Montreal to St. Albans, Vermont; as to what Fuller found in the Gladstone bag, Government's Ex. 2, at the customs office, St. Albans, Vermont, January 28, 1926.

(c) In the testimony of J. B. Kendrick in substance as to what he saw and heard in connection with Fuller and the defendant; as to whether the witness would know if the Gladstone bag had been opened since it was sealed at Montreal.

(d) In the testimony of G. E. Bingham in substance as to what he saw and heard in conversations with Fuller and the defendant; as to what he heard Walsh ask defendant and defendant's reply in the customs house at St. Albans.

(e) As to whether the witness was requested to examine the bag, Government Exhibit 2, by someone at the customs office at St. Albans, Vermont.

5. The court erred in receiving in evidence the baggage check, Government Exhibit 5.

6. The court erred in using the following language in the charge to the jury:

120 "If you find that the defendant falsely and fraudulently, intending to defraud the rev'nue of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while her person was being searched by Assistant Collector Walsh at the customs

house, he admitted that he had some diamonds in his Gladstone bag."

7. The court erred in making the charge to the jury in refusing to state propositions requested by the defendant in the following instance, to wit:

"6. *If, from all the evidence, the jury is satisfied by the required* measure of proof as indicated, that at some time, either before or during the trip from Montreal to St. Albans, the defendant intended to smuggle the diamonds into the United States for the purpose of evading the duties thereon, still, if the jury are satisfied from the evidence that he at any time during the examination of his baggage, and before the discovery of the diamonds by the customs officers, changed his mind and directed or told the officers where the diamonds were and delivered to said officers the key to the bag containing said diamonds, then he is not guilty of the crime charged."

"7. If the jury find that there was a change on the part of the defendant from an intent to commit the crime of smuggling, to an intent to declare the diamonds, then the jury must decide when the defendant had reasonable opportunity to act on such change or intent, and if the jury find that the defendant declared his possession of the diamond within a reasonable time after such change or intent, then he is not guilty of the crime charged."

121 Wherefore the defendant prays that the judgment of the District Court may be reversed and that the defendant have such other and further relief as to the court may seem just and proper.

BARNES, MCKENNA & HALSTEAD,
Attorneys for the Defendant,
Office & P. O. address, No. 2 Rector Street, New York City.

Endorsed: Due and timely service of a copy of the within assignment of errors is hereby admitted. Dated, Burlington, Vt., April 5, 1926. Allen Martin, assistant U. S. attorney.

Further endorsed: Filed with service accepted, April 15, 1926. Henry Conlin, clerk.

122 In the United States Circuit Court of Appeals

[Title omitted.]

Order allowing writ of error

Whereas the above-named defendant, Leib Ritterman, has this day sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit.

Now on motion of counsel for the defendant, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit the judgment heretofore entered in the United

States District Court for the District of Vermont on the 11th day of March, 1926.

Dated: New York, this 23d day of March, 1926.

HENRY WADE ROGERS,
United States Circuit Judge.

123 In United States Circuit Court of Appeals

[Title omitted.]

Petition for writ of error

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

And now comes Leib Ritterman, defendant herein, by Barnes, McKenna & Halstead, his attorneys, and says: That on the 11th day of March, 1926, the United States District Court for the District of Vermont entered judgment against this defendant, in which judgment and the proceedings had prior thereto in this cause errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be ordered to be sent to this court.

LEIB RITTERMAN, *Defendant,*
By BARNES, MCKENNA & HALSTEAD,
Attorneys for Defendant.

(Endorsed:) Due and timely service of a copy of the within petition and order is hereby admitted. Dated, Burlington, Vt., April 5, 1926. Allen Martin, assistant U. S. attorney.

(Further endorsed:) Filed with service accepted April 5, 1926. Henry Conlin, clerk.

124 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, April 14, 1926.

BARNES, MCKENNA & HALSTEAD,
Attorneys for Plaintiff in Error.
ALLEN MARTIN,
Assistant United States Attorney,
Attorney for Defendant in Error.

The following record is hereby ordered filed in lieu of the original papers for the purpose of certifying the record on appeal.

Done this 14th day of April, A. D. 1926.

HARLAND B. HOWE,
United States District Judge.

125 [Clerk's certificate to foregoing transcript omitted in printing.]

126 In United States Circuit Court of Appeals for the Second Circuit

No. 392—October term, 1925

Argued May 12, 1926. Decided June 10, 1926

LEIB RITTERMAN, PLAINTIFF in error v. UNITED STATES, DEFENDANT in error	In error to the District Court of the United States for the District of Vermont. Before ROGERS, MANTON, and HAND, Circuit Judges.

Opinion

Writ of error to the District Court for the District of Vermont.

Leib Ritterman was convicted of a violation of section 593 of the tariff act of 1922. Judgment of conviction. Defendant appeals. Reversed.

Barnes, McKenna & Halstead, of New York City (Albert MacC. Barnes, jr. and James M. Snee, both of New York City, of counsel) for plaintiff in error.

Harry B. Amey, U. S. Atty., of Island Pond, Vt., and Allen Martin, Asst. U. S. Atty., of Essex Junction, Vt.

MANTON, Circuit Judge: The indictment charged the defendant with crime in eight counts, but one of which was submitted to the jury. That count charged that on the 28th of January, 1926, while the plaintiff in error was a passenger on an international train from Montreal to New York, he did, within the district of Vermont, with intent to evade the payment of certain duties on some unset cut diamonds of great value, unlawfully, willfully, knowingly, and felonously smuggle and clandestinely introduce them into the United States, without making any proper declaration to any customs officer of the United States, and without causing the diamonds to be invoiced for the purpose of ascertaining the duties thereon. It set forth that the plaintiff in error had an opportunity so to do and failed.

Before leaving Montreal he went to the United States customs office there and offered a traveling bag for inspection prior to checking it through to New York City. He was asked if it contained his personal effects, to which he answered in the affirmative. The bag

was inspected, corded, and sealed, and the manifest was marked with baggage check number by the customs officer, and it was sent on the same evening train over the international railroad on which the plaintiff in error traveled. The customs officer was instructed to watch the plaintiff in error. On the train plaintiff in error was asked by the customs inspector whether he had anything to declare, first in Canada and later in Vermont, to which he answered "No." The inspector went to the baggage car and verified the fact that the traveling bag was there by looking at the number on the manifest and saw that the seal was intact. One of the Government inspectors testified that while in Canada on the first inquiry of the plaintiff in error whether he had anything to declare he said "No, there it is," pointing to a small hand bag at his berth, and on the second inquiry as to whether he had anything to declare he said "No."

When the train arrived at Swanton Junction, Vt., the plaintiff in error was asked by the deputy inspector of customs if he had anything to declare and replied that he had not. However, at this time no reference was made to the bag in the baggage car. When the train arrived at St. Albans, Vt., which was the first port of entry and the first opportunity to declare the diamonds, the
127 plaintiff in error was requested to leave the train, and there was confronted by the collector of customs, and the bag was removed from the baggage car to his office. But this was without the knowledge of the plaintiff in error. He was then asked if he had anything to declare, to which he answered "No." Asked if he had any diamonds to declare, he answered "No, sir." He was asked, "Are you sure you have nothing to declare?" and he said, "I have nothing to declare." A third question was asked, "Have you any diamonds to declare?" to which he answered, "No, sir." He was then asked if he had in his baggage or on his person any articles intended for any other person or for sale, or purchase by him on commission for others, which he had not declared to the collector, and he answered "No." Further, he was asked, "Have you any articles in your baggage or on your person that belongs to any other person?" and his answer was "No." He was then told that the officers had information to the effect that he had a quantity of diamonds in his possession the day before in Montreal, and he replied, "I did; I placed those diamonds in the safety deposit box of the Bank of Nova Scotia in Montreal."

Thereupon the customs inspector told him it would be necessary to examine his person. He stepped into an adjoining room and an examination was thereupon made. He was asked to remove his hat, coat, overcoat, collar, and necktie. He was asked for the key of his bag, which he gave after the second request. While removing his clothing, he said that he would like to talk to one of the inspectors alone. He said to one of the inspectors, "I have got to speak to you alone," to which the inspector said, "Come into the other room"; and he said, "I haven't the diamonds on my person; they are in my grip." This was then repeated in the presence of another inspector.

The bag was opened and the diamonds were found; some in a pocket inside the collar box, others in socks, and still more in a talcum-powder box. The diamonds thus found were valued at $122,492.43, and these were seized. No evidence was offered on behalf of the defendant. Upon these facts he was convicted of the charge submitted to the jury.

The court charged the jury that "if you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag." Exception was taken to this charge, and it is assigned as error.

If the facts, as thus proven by the Government, did not constitute the offense of smuggling under section 593 of the tariff act of 1922, this charge was erroneous. We think it did not. That section provides:

"(a) If any person knowingly and willfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, every such person, his, her, or their aiders, and abettors, shall be deemed guilty of a misdemeanor. * * *

"(b) If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both."

42 Stat. 858 (Comp. St. Ann. Supp. 1923, §§ 5841h12, 5841h13).

In Keck v. United States, 172 U. S. 434, 19 S. Ct. 254, 43 L. Ed. 505, it was held that an offense under subdivision (a) of this section is not committed by an act done before the obligation to pay or account for the duties arises, although acts on the part of the prisoner may indicate a future purpose to evade when the period of payment or securing the payment of duties has been reached. Keck, through a confederate in Europe, gave a package of diamonds to a ship's captain to bring to the United States and send to him at Cincinnati. The package was taken by the captain, and when the vessel arrived at Philadelphia it was boarded by a Treasury agent, who had information that the captain was endeavoring to smuggle

diamonds at the instance of Keck. The captain was asked if he had a package of diamonds for Coaterman Diamond Company, 24 West Fourth Street, Cincinnati, Ohio, to which he answered "No,
128 I have no such package." The agent said, "I beg leave to differ with you," and said, "You have a small package which you received while in Antwerp." To which the captain replied, "I have a package for Van Reeth of 21 West Fourth Street, Cincinnati, and I will give it to you if you have an order for it." Later, on learning that the man talking to him was a customs officer, and being told that he could be arrested, the captain delivered over the package of diamonds. The jury was instructed that "if the statement made here under oath by Capt. Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

This was urged as error, and in reversing the conviction the Supreme Court said:

"Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law: First. That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense referred to. * * * Second. That the smuggling or clandestine introduction of goods referred to in the statute must be 'without paying or accounting for the duty,' is also beyond question. From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be, and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. From the second, it results that as the words, 'without paying or accounting for the duty' imply the existence of the obligation to pay or account at the time of the commission of the offense, which duty is evaded by the guilty act, it follows that the offense is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached."

The court pointed out that, if such were not the construction of the statute, the offense of smuggling or clandestine introduction might be committed as to goods, although entry of such goods had been made and all legal duties had been paid before the goods had been unshipped. Further it was said:

"For, although it was contended that the offense was complete the moment the concealment existed when the ship arrived within the waters of the United States, it was yet conceded that if in legal time the duties were subsequently paid or secured, there would have

been no offense committed. But the contention and the admission are completely irreconcilable, since if the subsequent act becomes necessary in order to determine whether an offense has been committed, it can not in reason be said that the offense was complete and had been committed before the subsequent and essential act had taken place."

In United States v. One Pearl Chain, 139 F. 513, 71 C. C. A. 500, this court had occasion to consider what constituted smuggling or clandestinely introducing a pearl chain into the commerce of the United States without paying customs duties. There a woman had made a prior declaration omitting the pearl chain. The special Treasury agent approached her, told her he knew she had purchased a pearl necklace in Paris, which she had omitted to declare, and asked her to introduce it. She first said that she had one of her necklaces mended at Tiffany & Co., and that she had not purchased any necklace, but, being pressed further, said she had purchased the necklace. In response to her request that she produce it, she returned on board with the officer and her husband and gave it to him. He put it in his pocket and walked away. We held that she could not, under such circumstances, be held for failure to make a declaration of entry, and said:

"If, instead of requiring the passenger to make due entry of dutiable articles which such passenger produces, they elect to seize and remove them before the passenger is called upon to complete his entry, he is not to be held responsible for failure to include them in the itemized entry, provided he has mentioned them to the customs officer when he first made his entry."

This court further said that "until the obligation to pay or account for the duties arises the offense of smuggling is not complete, and no cause of forfeiture accrues."

The customs officers knew that the plaintiff in error had the diamonds when he became a passenger and sent his bag through to New York. Under section 461 of the tariff act of 1922 (42 Stat. 858 (Comp. St. Ann. Supp. 1923, § 5841e—30)), the baggage
129 should have been unladen in the presence of the owner and inspected by the customs officer "at the port of entry at which the same shall arrive," and it is required that the person having charge or possession of any trunk or traveling bag must open the same for inspection and furnish a key or other means for opening the same. The law does not contemplate taking a key from a passenger and opening and examining the bag at some place other than in the passenger's presence. This court pointed out in United States v. One Pearl Necklace, 111 F. 164, 49 C. C. A. 287, 56 L. R. A. 730, that "if at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger, which is sufficient to put the customs officers upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were mentioned to the collector before whom such entry was made."

On this record there is no proof that the plaintiff in error, until in the course of the search of his person and before its completion, was requested to give up the key to the bag, nor is there proof that he knew at that time that the bag was in the customs house. When he gave up the key and stated that he had no diamonds to declare, he did not commit the offense of smuggling the merchandise within the statute. When he later said, "I haven't the diamonds on my person; they are in my grip," it was prior to a time that a declaration was required of him at a port of entry, which was St. Albans, Vt. The collector, not being satisfied with the knowledge that the diamonds were in the bag, completed his search of his person and found nothing.

The jury might well have found that there was an attempt on the part of the plaintiff in error to smuggle the merchandise through the customs, but that offense was not completed, and under the authorities referred to no violation of section 593 was committed. In Newman v. United States (C. C. A.) 276 F. 298, the defendant was a passenger on a steamship, and left the ship when an inspector of customs, who had his baggage declaration on the pier, asked him whether he had anything to declare, and he answered in the negative. The same question was asked by the deputy surveyor of customs, and the same answer given. Later a Government appraiser was called, who appraised the articles in his declaration and went aboard the ship into his cabin and searched him. Two fountain pens were removed from one of his vest pockets, and when the officers heard a rattle of the contents the defendant stated that the pen had been out of order a couple of weeks, and perhaps there were a couple of pieces of the broken pen inside. The defendant persisted in his concealment and false statements. Shortly after some diamonds were found in the barrel of the broken pen. The defendant then asked, if he made a clean breast of it, if immunity would be granted to him, to which the officer stated that he had no authority so to do. Upon further questioning, the defendant produced the other fountain pen, which contained four diamonds, and a box of tooth paste, from which he took a tube, squeezed it, and two more diamonds were in its contents. This court affirmed the conviction and held that the smuggling had been so fully executed that all there was left for the defendant to do was to escape detection. For the reason there stated the case is to be distinguished from the one at bar, which is well within the holding of the Keck case.

In United States v. One Trunk, 184 F. 317, 106 C. C. A. 459, in considering the time of making entry, this court said: "We reached the conclusion that 'if at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger, which is sufficient to put the customs officers upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were mentioned to the collector before whom such entry was made.'"

Upon the evidence in this record it was error to instruct the jury in the language quoted, to which exception was taken. It was erroneous to adopt section 593 of the tariff act of 1922 as the basis of the indictment on the evidence in this case. Whatever may be the responsibility of the plaintiff in error under other sections of the tariff act specifically designed to cover attempts at fraud in connection with passengers' baggage is not before us.

Judgment of conviction reversed.

Judge Rogers concurred in these views, but, owing to his absence, has not read this opinion.

130 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

Filed June 10, 1926

Error to the District Court of the United State for the District of Vermont.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Vermont and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

M. T. M.
L. H.

131 [File endorsement omitted.]

132 [Petition for rehearing, covering 25 pages, filed June 23, 1926, omitted from this print. It was denied and nothing more by order July 5, 1926.]

158 In United States Circuit Court of Appeals

[Title omitted.]

Order denying petition for rehearing

Filed July 6, 1926

A petition for a rehearing having been filed herein by counsel for the defendant in error,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

M. T. M.
L. H.

159 [File endorsement omitted.]

160 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. ——. United States Circuit Court of Appeals, Second Circuit. Term No. ——. The United States of America, petitioner, vs. Leib Ritterman. Petition for writ of certiorari and exhibit thereto. Filed ——— —, 1926. File No. ——.

○

Supreme Court of the United States

Ordering allowing certiorari

Filed November 23, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

LEIB RITTERMAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on the 10th day of June, 1926 (R. 83), reversing the judgment of the United States District Court for the District of Vermont, an order denying a petition for rehearing having been filed in the Circuit Court of Appeals July 6, 1926 (R. 83).

QUESTION PRESENTED

The question presented in this case is when the crime of smuggling is consummated under Section

593 (a) of the Tariff Act of 1922, and whether one traveling by rail, who clandestinely introduces dutiable articles into the United States with intent to evade the payment of duty, and who by false statements to customs officers stationed abroad procures the passage of dutiable articles across the international boundary as nondutiable baggage, and who repeatedly asserts to customs officers that he has no dutiable merchandise to declare, may escape conviction on the ground that he has not completed the offense, because the dutiable articles are discovered at the customs house during a search of his person and baggage, he having finally admitted the presence of the dutiable merchandise in his baggage after the search had progressed so far as to make detection certain.

STATEMENT

The respondent, Leib Ritterman, was indicted in the United States District Court for the District of Vermont for violation of Section 593(a) of the Tariff Act of 1922, which provides punishment for smuggling or clandestinely introducing into the United States any merchandise which should have been invoiced, with intent to defraud the revenue of the United States. He was convicted, and on writ of error the Circuit Court of Appeals reversed the judgment of the District Court.

Ritterman, traveling by rail from Montreal to New York, checked as baggage a Gladstone bag containing his wearing apparel and, as it after-

wards developed, diamonds of the value of $102,077.03. To the United States inspector at Montreal, stationed there for the convenience of travelers, he declared he had no dutiable articles in his baggage. To customs officers on the train, both before and after crossing the international boundary, he made the same declaration. Under ordinary circumstances, this would have allowed the baggage to be carried to destination free from further examination by customs officers, but, entertaining suspicions as to his good faith, the customs officers asked Ritterman to leave the train at St. Albans, Vt., and there he and his baggage were taken to the customs house, where he was again asked to declare dutiable articles, and said he had none, and when asked about the diamonds said he had left them in Montreal. A search of his person and baggage then commenced, he being in one room and his baggage in another. When it became evident that discovery was inevitable, he confessed that the diamonds were in his baggage. Simultaneously with this confession by him, but not as a result of it, those searching the baggage in another room discovered the diamonds.

The Circuit Court of Appeals held that the facts of the case brought it within the doctrine of *Keck v. United States*, 172 U. S. 434, and that Ritterman had not consummated the crime of smuggling by acts committed before the obligation to pay or account for the duty arose. The Government contends that the doctrine announced in the *Keck* case

is inapplicable; that the cases are distinguishable on the facts, and that the wording of the statute on which the decision in the *Keck* case turned has been changed.

A more complete statement of the facts will be found in the supporting brief.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court and in holding that the defendant was not guilty of smuggling under Section 593(a) of the Tariff Act of 1922.

2. The Circuit Court of Appeals misapplied in the present case the doctrine of the *Keck* case.

3. The Circuit Court of Appeals erred in failing to note and giving proper effect to the omission of the words "without paying or accounting for the duty" from the present statute, which words were contained in Section 2865 of the Revised Statutes under consideration in the *Keck* case.

4. That the decision of the Circuit Court of Appeals is in conflict with the decision of that court in the case of *Newman* v. *United States*, 276 Fed. 798, in which case certiorari was refused by this Court.

5. That the question involved is one of substance relating to the construction of the statutes of the United States and is of importance in the enforcement of the Customs Laws.

For these reasons it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1926.

BRIEF IN SUPPORT OF PETITION

OPINION OF COURT BELOW

The only opinion in this case is that of the Circuit Court of Appeals, 12 F. (2d) 849, which will be found at page 77 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1926 (R. 83). A petition for rehearing was filed and entertained and was denied by the Circuit Court of Appeals July 6, 1926 (R. 83).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE STATUTE

Section 593(a) of the Tariff Act of 1922 provides (c. 356, 42 Stat. 858, 982):

> If any person knowingly and wilfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any mer-

chandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the Court.

STATEMENT

On the 28th day of January, 1926, the respondent, Leib Ritterman, boarded the Central Vermont Railway train known as the Washingtonian, at Montreal, Canada, at 8.15 p. m., bound for New York by way of St. Albans, Vermont.

For the accommodation of travelers proceeding from Canada into the United States, United States customs officers are stationed at Montreal for the purpose of there examining personal baggage, to be checked as such to points within the United States. If the baggage is found to contain no unexempted dutiable articles it is corded and sealed by the customs officer at Montreal, who attaches to it a special manifest showing that there is no duty to be paid, and, under ordinary circumstances, if no suspicions are aroused, the customs officer who boards the train after it crosses the international boundary cuts the cord and seal and removes the manifest, and the baggage is there-

upon free to go to destination and be delivered to the traveler.

Article 224 of the Customs Regulations of 1923, dealing with this subject is as follows:

> Baggage examined abroad—Disposition at first port of arrival.—Baggage examined by inspectors of the United States customs stationed at places in the Dominion of Canada, if containing no dutiable merchandise, will be corded, sealed, and forwarded under special manifest as herein provided, or placed in a sealed car or compartment and accompanied by a sheet manifest.
>
> Dutiable articles and exemptions allowed, if any, will be indorsed on the manifests by examining inspectors for the information of the collector at the first port of arrival in the United States.
>
> The special manifest herein provided must be furnished by the transportation companies, and shall be made on white cardboard, not less than 2½ by 4½ inches, in the following form:

SPECIAL MANIFEST OF BAGGAGE

Check No.——

This baggage is in transit from —— (foreign country) to ——, in the United States.

I certify that this baggage was duly corded and sealed by me; that the packages have been carefully examined, passed, and laden under my personal supervision; and that there are no dutiable goods of any kind con-

tained therein nor exemptions allowed, except as noted hereon.

Dutiable goods, ———.

Exemptions allowed, ———.

———— ————.

United States Inspector of Customs.

The card manifests will be placed on the cords back of the seal. When the inspector boards a train at the first port of arrival of the baggage, he will cut the cord and retain the manifest for filing in his office.

If the baggage is to reenter foreign contiguous territory before it reaches its final destination in the United States, the cord will be cut by the inspector at the last port of arrival.

The sealing officer may keep a book record of baggage for reference.

The special manifest may show dutiable goods, but the regulation contemplates that the exemptions allowed are as much as the dutiable articles. If the amount of dutiable goods exceeds the exemptions, the sheet manifest is used and the baggage is reexamined and the duty collected at the first port of entry.

Before boarding the train Ritterman checked to New York as his personal baggage a Gladstone bag which contained some of his personal effects and in which, as it afterwards developed, he had secreted in the toes of socks, in a talcum-powder box, and in a collar box (R. 25, 30) diamonds of the value of $102,077.03. (R. 51.) Before the bag was

checked, Ritterman, according to regulations, submitted it to the United States customs inspector at Montreal for examination, then declaring, in response to questions by the inspector, that it contained only his personal wearing apparel. The inspector examined the bag, evidently in a superficial way, and corded and sealed it and attached to it a special manifest, as provided by Article 224 of the Customs Regulations, and the baggage check was delivered to Ritterman. (R. 11, 12, 13.) In the absence of suspicions by the customs officers, which might result in further examination, and under ordinary circumstances, this would have resulted in the baggage containing the diamonds entering the United States without the payment of duty. Ritterman carried other personal baggage with him when he boarded the train for New York City.

On the train, both before and after crossing the international boundary, the United States customs officers asked him if he had any dutiable merchandise to declare and he replied in the negative. (R. 17, 20.) On reaching St. Albans, Vt., he was asked to leave the train (R. 18) and go to the customs office, which he did. The Gladstone bag was also removed from the train by the customs officers and taken to the customs office. (R. 24.) Ritterman was taken into one room, where he was examined by some officials, and the Gladstone bag was taken into another room in the customs office, where it was examined by customs officials. Upon arrival at the customs house at St. Albans he was asked if

he had anything to declare. He said "No, sir." He was asked the second time "Are you sure you have nothing to declare?" and he said "I have nothing to declare." The third question was "Have you any diamonds to declare?" He said "No, sir." (R. 42, 46.) He was then turned over to another customs official, who asked him if he had in his baggage or on his person any articles intended for any other person or for sale or that he had purchased on commission for others that he had not declared to the collector and he answered in the negative. He was then told that the reason he was asked about diamonds was that the customs officer had information to the effect that he had a quantity of diamonds in his possession that day at Montreal, and he replied: "I did; I placed those diamonds in the safety deposit box of the Bank of Nova Scotia in Montreal." (R. 46.) He was then told that it would be necessary for the officials to examine his person, and he was told to remove certain of his clothing.

At that point the customs officer coming in from the other room where Ritterman's baggage was being examined asked Ritterman for the key to his baggage, which he surrendered. (R. 46.) The officer who took the key went back where the baggage was, immediately opened the bag and discovered the concealed diamonds. (R. 48.) Meanwhile, the examination of Ritterman's person proceeded. Some three, four, or five minutes after he

had surrendered the key, and after he had continued disrobing for that length of time, Ritterman told one of the officers examining him that he wanted to speak to him privately, and then he said that the diamonds were in his baggage. (R. 48.) There is no evidence that the discovery of the diamonds in his bag resulted from his confession. The jury would have been justified in finding that the officers examining the bag discovered the diamonds before Ritterman confessed they were there. At best, from Ritterman's standpoint, the discovery of the diamonds was practically simultaneous with his confession, but not the result of it.

At the trial the Court charged the jury as follows:

> If you find that the defendant falsely and fraudulently, intending to defraud the revenues of the United States, told Collector Whitehill and Assistant Collector Walsh at the Customs House that he did not have any diamonds to declare, this completed the offense of smuggling notwithstanding that later while his person was being searched by Assistant Collector Walsh at the Customs House he admitted that he had some diamonds in his Gladstone bag. (R. 67.)
>
> If the defendant intended to smuggle the merchandise in question he had an opportunity to change his mind up to the time when the obligation to pay or account for the duties arose, and if you believe that the defendant did so change his mind and did

so declare then it is your duty to find him not guilty. (R. 68.)

If you find as a fact that the defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed; if you believe that he then availed himself of this opportunity, then your verdict should be not guilty. (R. 68.)

The specification of errors to be urged is contained in the petition for certiorari.

ARGUMENT

The Circuit Court of Appeals reversed the judgment of conviction on the supposed authority of *Keck* v. *United States*, 172 U. S. 434. In that case the Court considered Section 2865 of the Revised Statutes, which read as follows:

> If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, *without paying or accounting for the duty*, or shall make out or pass, or attempt to pass, through the custom-house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and

> on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court. (Italics ours.)

The clause "without paying or accounting for the duty," contained in the statute considered in the *Keck* case was, subsequent to the decision in that case, omitted in the reenactment of the statute by Section 593(a) of the Tariff Act of 1922.

In the *Keck* case it appeared that *Keck* had given to the master of a vessel at Antwerp a small package, which he said did not contain any valuables, with the request that the captain, whose vessel plied between Liverpool and Philadelphia, take the package to the United States and on arrival there send the package to one Van Reeth at an address in Cincinnati. Just as the vessel was coming into the dock at Philadelphia she was boarded by a customs officer, who went to the captain and asked him if he had a package for the Coeterman Diamond Company. The captain said that he had no such package, but that he had a package for a man named Van Reeth. While at first the captain did not know that he was dealing with a customs official and supposed that he was some agent of the owner of the package, he made no false statements to the customs official, he produced the package, and on request delivered it to the customs official.

The *Keck* case was argued twice, was affirmed by a divided court, and thereafter restored to the

docket and submitted, and the conviction reversed, four Justices dissenting. Emphasis is laid in the opinion on the clause " without paying or accounting for the duty " in the statute then under consideration, and which is not found in the statute here involved, but beyond that the cases are distinguishable on the facts. The gist of the *Keck* case is that no concealment or evasion or misstatement occurred at or after the time when it was the duty of the importer to declare dutiable merchandise, and it appears that the moment the vessel reached her moorings and a customs inspector boarded her and made inquiry, and at the very first opportunity for declaration of dutiable merchandise, the package was produced and delivered to customs officers.

The case at bar is quite different. In order to procure the introduction of the diamonds into the United States in his personal baggage in such a way as to escape the duty, Ritterman falsely declared to the customs officer at Montreal that his baggage contained no dutiable merchandise, and the crime of smuggling was complete within the United States when, under these circumstances and as a result of these false declarations, and taking advantage of the provisions of Article 224 of the customs regulations, Ritterman brought about the actual introduction of the dutiable merchandise into the United States as duty free; but if this be not sufficient, it appears that after the merchandise had crossed the boundary line he repeated

to the customs officials on the train that he had no dutiable merchandise, and finally, at the port of entry, St. Albans, when questioned at the customs house, he reiterated that he had no dutiable merchandise and particularly stated that he had left his diamonds at Montreal. By that time he had certainly reached the point where he was required to declare dutiable merchandise and invoice it and pay the duty thereon. It seems immaterial that the dutiable merchandise was discovered within a few minutes after his last false statements or before he was permitted to leave the customs office.

Unlike the master of the vessel in the *Keck* case, Ritterman, on reaching the point where declaration and payment of duty were required, persisted in his efforts to escape the duty and deceive the customs officials. Surely, under such circumstances, it is not necessary that the customs officers shall pretend to believe the false statements and allow the suspected individual to leave the customs office with his baggage in order that the crime of smuggling or clandestinely introducing dutiable articles be consummated; and we see no reason to believe that the Court intended in the *Keck* case to hold that, under circumstances such as are found here, the confession by the smuggler simultaneously with the discovery of the dutiable merchandise, or when a search has proceeded so far as to make discovery inevitable, leaves him immune from punishment. If such be the law, violation of this statute

is not committed in most cases until the offense of smuggling is not only complete but successful.

The facts of this case bring it squarely within the terms of the statute. The dutiable merchandise was clandestinely introduced into the United States; this was done with intent to defraud the revenue; and the point was not only reached but passed, when the goods should have been declared and invoiced.

It is believed that the case at bar falls more nearly within the facts of the case of *Newman v. United States*, 276 Fed. 798. In that case Newman, a passenger of the Steamship *Stavangerford*, arrived in Brooklyn in February, 1920, and left the ship for the pier. An inspector of Customs had Newman's baggage declaration and on the pier asked him if he had declared everything he had purchased or obtained abroad. Newman said he had declared everything. Later a Customs inspector said to Newman, "I am going to give you one more chance. If you have anything on your person, or anything you bought abroad, and have not declared it, now is your time to declare it. I want to give you every chance in the world to make a declaration." To which Newman responded, "I have declared everything. Go ahead and search me, if you want to." The inspectors then accompanied Newman back aboard the ship, entered his cabin and searched him. Two fountain pens were removed from one of Newman's pockets. Noticing

that the pen rattled the inspector asked Newman what was in the pen, to which he responded "Perhaps a couple of pieces of broken pen. It has been out of order for a couple of months," whereupon the inspector broke the pen and disclosed seven diamonds. Another pen was found on his person containing four diamonds. Finally after further pressing, the defendant Newman, took a box of tooth paste from his handbag, squeezed the tube and two more diamonds came out with the paste. The Circuit Court of Appeals in that case said:

> * * * at a time when the customs officers not only had before them a false declaration, but in addition had physical possession of part of the smuggled goods, was it requisite that they should wait until the smuggler left the customs inclosure before they could apprehend him, on the theory that the crime was only then committed? Such a construction would make a mockery of the statute, and render it in large measure useless. In this case there was not an unexecuted purpose, nor a mere attempt to smuggle, as in the Keck Case, supra. On the contrary, there is no similarity between the facts of that case and of this. Here the smuggling had been so fully executed that all that was left for Newman to do was to escape detection.

Petition for certiorari in the *Newman case, supra*, was denied by this Court (*Newman* v. *United States*, 258 U. S. 623), and this while the words

"without paying or accounting for the duty" remained in the statute.

The importance of this case, in its relation to the enforcement of the customs laws as applied to travelers, is evident, and there is reason enough to justify the issuance of the writ.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
J. KENNEDY WHITE,
Attorney.
HARRY B. AMEY,
United States Attorney for Vermont.
ALLEN MARTIN,
Assistant United States Attorney for Vermont.

SEPTEMBER, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 669

THE UNITED STATES OF AMERICA, PETITIONER

v.

LEIB RITTERMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 77) is reported in 12 F. (2d) 849.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1926. (R. 83.) A petition for rehearing was filed and entertained, and was denied by the Circuit Court of Appeals July 6, 1926. (R. 83.) Petition for writ of certiorari was filed October 4, 1926, and the writ was allowed November 23, 1926. (R. 85.) The jurisdiction of this Court is based on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION

The question presented in this case is when is the crime of smuggling consummated under Section 593 (a) of the Tariff Act of 1922, and whether one traveling by rail, who clandestinely introduces dutiable articles into the United States with intent to evade the payment of duty, and who by false statements to customs officers stationed abroad procures the passage of dutiable merchandise across the international boundary line into the United States as nondutiable baggage, under a practice which requires no further examination in the United States, and who repeatedly asserts to customs officials at the port of entry that he has no dutiable merchandise to declare, may escape conviction on the ground that he has not completed the offense, because the dutiable articles are discovered at the customhouse during a search of his person and baggage.

THE STATUTE

Sec. 593(a) Tariff Act of 1922 (c. 356, 42 Stat. 858, 982):

> SEC. 593. *Smuggling and clandestine importations.*—(a) If any person knowingly and willfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice,

every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court.

STATEMENT

The respondent, Leib Ritterman, was indicted and convicted in the United States District Court for the District of Vermont for violation of Section 593(a) of the Tariff Act of 1922, which provides punishment for the smuggling or clandestine introduction into the United States of any merchandise which should have been invoiced, with intent to defraud the revenues of the United States. On writ of error the Circuit Court of Appeals reversed the judgment of the District Court on the ground that the offense had not been consummated.

On the 28th day of January, 1926, at 8.15 P. M., Ritterman boarded at Montreal, Canada, the Central Vermont Railway train known as the Washingtonian, bound for New York by way of St. Albans, Vermont. Before boarding the train Ritterman checked to New York as his personal baggage a Gladstone bag, which contained some of his personal effects and in which, as it afterwards developed, he had secreted in the toes of socks, in a talcum powder box and in a collar box (R. 25, 30) uncut diamonds of the value of $102,077.03 (R. 51).

For the accommodation of travelers proceeding from Canada into the United States, United States

customs officers are stationed at Montreal for the purpose of there examining personal baggage, to be checked as such to points within the United States. If the baggage is found to contain no unexempted dutiable articles it is corded and sealed by the customs officer at Montreal, who attaches to it a special manifest showing that there is no duty to be paid, and, under ordinary circumstances, if no suspicions are aroused, the customs officer who boards the train after it crosses the international boundary cuts the cord and seal and removes the manifest, and the baggage is thereupon free to go to destination and be delivered to the traveler.

Articles 224 of the Customs Regulations of 1923, dealing with this subject, is as follows:

> *Baggage examined abroad.—Disposition at first port of arrival.*—Baggage examined by inspectors of the United States customs stationed at places in the Dominion of Canada, if containing no dutiable merchandise, will be corded, sealed, and forwarded under special manifest as herein provided, or placed in a sealed car or compartment and accompanied by a sheet manifest.
>
> Dutiable articles and exemptions allowed, if any, will be indorsed on the manifests by examining inspectors for the information of the collector at the first port of arrival in the United States.
>
> The special manifest herein provided must be furnished by the transportation com-

panies, and shall be made on white cardboard, not less than 2½ by 4½ inches, in the following form:

SPECIAL MANIFEST OF BAGGAGE

Check No.——

This baggage is in transit from——(foreign country) to——, in the United States.

I certify that this baggage was duly corded and sealed by me; that the packages have been carefully examined, passed, and laden under my personal supervision; and that there are no dutiable goods of any kind contained therein nor exemptions allowed, except as noted hereon.

Dutiable goods, ———.

Exemptions allowed, ———.

———— ————,

United States Inspector of Customs.

The card manifests will be placed on the cords back of the seal. When the inspector boards a train at the first port of arrival of the baggage, he will cut the cord and retain the manifest for filing in his office.

If the baggage is to reenter foreign contiguous territory before it reaches its final destination in the United States, the cord will be cut by the inspector at the last port of arrival.

The sealing officer may keep a book record of baggage for reference.

The special manifest may show dutiable goods, but the regulation contemplates that the exemptions allowed may be as much as the dutiable articles. If

the amount of dutiable goods exceeds the exemptions, the sheet manifest is used and the baggage is reexamined and the duty collected at the first port of entry.

Section 461 of the Tariff Act of 1922 provides:

> All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of, and be inspected by a customs officer at the first port of entry at which the same shall arrive.

This section, authorizing the Secretary to provide by regulation for inspection at a place other than the first port of entry, is the authority for regulation 224 above set forth, which, for the convenience of travelers, allows inspection of baggage at places in the Dominion of Canada merely for the purpose of determining that there are no dutiable articles in it. Similar authority is found in Section 498 of the Tariff Act of 1922, which provides:

> The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of * * *
>
> (6) Articles carried on the person or contained in the baggage of a person arriving in the United States * * *.

Article 205 of the regulations provides:

> All merchandise and baggage imported or brought into the United States from contiguous foreign territory, unless destined to

> an interior port in bond, shall be unladen in the presence of and inspected by a customs officer at the first port of entry at which same shall arrive. * * *
>
> Declaration on Customs Form 6063 will be required for articles acquired abroad exceeding $25 in value.

By Treasury Decision 40803, issued April 11, 1925, article 205 of the regulations was amended to provide that the declaration should be on form 6059. A copy of this form is set out in the appendix to this brief. It calls for a description of articles obtained abroad, the price paid and description of the trunks or bags. Attention is called to the statement at the bottom of the form, which reads: "This form may be used as a pro forma invoice and manifest when necessary." There are some other sections of the statute and regulations which have no direct bearing here and need not be set forth at length. Section 484 of the Tariff Act requires the entry of all merchandise and the production of a certified invoice. Regulation 260 provides for production of a certified invoice, with provisions for waiving the certified invoice by the collector. Article 247 of the regulations, requiring the production of invoices certified by a consular officer, waives the requirement for a consular invoice in the case of "articles carried on the person or contained in the baggage of a person arriving in the United States." In the case of personal effects the customs form of declaration 6059 set forth in the appendix is, as

shown thereon, accepted as "a pro forma invoice." The uncut diamonds involved in this case were not personal effects and should have been accompanied by a certified invoice or at least should have been invoiced "pro forma" by the use of customs form 6059.

Before his bag was checked, Ritterman, according to these regulations, submitted it to the United States customs inspector at Montreal for examination, then declaring, in response to questions by the inspector, that it contained only his personal wearing apparel. The inspector examined the bag, evidently in a superficial way, and corded and sealed it and attached to it a special manifest, as provided by Article 224 of the Customs Regulations, and the baggage check was delivered to Ritterman. (R. 11, 12, 13.) In the absence of suspicions by the customs officers, which might result in further examination, and under ordinary circumstances, this would have resulted in the baggage containing the diamonds entering the United States without further inspection or declaration and without the payment of duty. Ritterman carried other personal baggage with him when he boarded the train for New York City. (R. 16, 17.)

On the train, both before and after crossing the international boundary, the United States customs officers asked him if he had any dutiable merchandise to declare, and he replied in the negative. (R. 17, 20.) On reaching St. Albans, Vt., the first port

of entry, he was asked to leave the train (R. 18) and go to the customs office, which he did. The Gladstone bag was also removed from the train by the customs officers and taken to the customs office (R. 24), but it does not appear Ritterman knew that until later asked for the key. Ritterman was taken into one room, where he was examined by some officials, and the Gladstone bag was taken into another room in the customs office, where it was examined by other officials. Upon arrival at the customs house at St. Albans he was asked if he had anything to declare. He said, "No, sir." He was asked the second time, "Are you sure you have nothing to declare?" and he said, "I have nothing to declare." The third question was, "Have you any diamonds to declare?" He said, "No, sir." (R. 42, 46.) He was then turned over to another customs official, who asked him if he had in his baggage or on his person any articles intended for any other person or for sale or that he had purchased on commission for others that he had not declared to the collector, and he answered in the negative. He was then told that the reason he was asked about diamonds was that the customs officer had information to the effect that he had a quantity of diamonds in his possession that day at Montreal, and he replied: "I did; I placed those diamonds in the safety-deposit box of the Bank of Nova Scotia in Montreal." (R. 46.) He was then told that it would be necessary for the officials to examine his

person, and he was told to remove some of his clothing.

At that point the customs officer coming in from the other room where Ritterman's baggage was being examined asked Ritterman for the key to his baggage, which he surrendered. (R. 46.) The officer who took the key went back where the baggage was, immediately opened the bag and discovered the concealed diamonds. (R. 48.) Meanwhile, the examination of Ritterman's person proceeded. Some three, four, or five minutes after he had surrendered the key, and after he had continued disrobing for that length of time, Ritterman told one of the officers examining him that he wanted to speak to him privately, and then he said that the diamonds were in his baggage. (R. 48.) There is no evidence that the discovery of the diamonds in his bag resulted from his confession. The jury would have been justified in finding that the officers examining the bag discovered the diamonds before Ritterman confessed they were there. At best, from Ritterman's standpoint, the discovery of the diamonds was practically simultaneous with his confession, but not the result of it.

At the trial the Court charged the jury as follows:

> If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehill and Assistant Collector Walsh at the Customs House that he did not have any diamonds to declare, this completed the

offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the Customs House, he admitted that he had some diamonds in his Gladstone bag. (R. 67.)

If the defendant intended to smuggle the merchandise in question, he had an opportunity to change his mind up to the time when the obligation to pay or account for duties arose, and if you believe that the defendant did so change his mind and did so declare then it is your duty to find him not guilty.

If you find as a fact that the defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him, and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed; if you believe that he then availed himself of this opportunity then your verdict should be not guilty. (R. 68.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in reversing the judgment of the District Court and in holding that the defendant was not guilty of smuggling under Section 593(a) of the Tariff Act of 1922.

SUMMARY OF ARGUMENT

The crime of smuggling as defined by Section 593(a) of the Tariff Act of 1922 is consummated if dutiable merchandise is clandestinely brought into the United States concealed in the owner's

baggage after the owner has fraudulently procured a waiver of inspection in the United States by false statements to a customs officer stationed abroad, at least where the waiver of inspection in the United States is rescinded and the owner after arrival at the first port of entry and being called on to declare dutiable articles fraudulently fails to do so. In any view of this case the defendant consummated the crime when on reaching the first port of entry he failed and refused to declare the dutiable articles. The fact that his crime was detected and the dutiable articles discovered before he left the customs house, did not prevent the crime from having been consummated. Successful evasion of the payment of duties is not an essential element of the crime denounced by Section 593(a) of the Tariff Act. The doctrine announced in the case of *Keck* v. *United States*, 172 U. S. 434, is not applicable as the cases are readily distinguishable on the facts.

ARGUMENT

The Circuit Court of Appeals reversed the judgment of conviction on the supposed authority of *Keck* v. *United States*, 172 U. S. 434. In that case the Court considered Section 2865 of the Revised Statutes, which read as follows:

> If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced,

> *without paying or accounting for the duty*, or shall make out or pass, or attempt to pass, through the customhouse any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court. (Italics ours.)

The clause "without paying or accounting for the duty," contained in the statute considered in the *Keck case* was, subsequent to the decision in that case omitted in the reenactment of the statute by Section 593 (a) of the Tariff Act of 1922.

In the *Keck case* it appeared that Keck had given to the master of a vessel at Antwerp a small package, which he said did not contain any valuables, with the request that the captain, whose vessel plied between Liverpool and Philadelphia, take the package to the United States and on arrival there send the package to one Van Reeth at an address in Cincinnati. Just as the vessel was coming into the dock at Philadelphia she was boarded by a customs officer, who went to the captain and asked him if he had a package for the Coeterman Diamond Company. The captain said that he had no such package, but that he had a package for a man named Van Reeth. While at first the captain did not know that he was dealing with a customs official and supposed that he was some agent of the

owner of the package, he made no false statements to the customs official, he produced the package, and on request delivered it to the customs official.

The *Keck case* was argued twice, was affirmed by a divided court, and thereafter restored to the docket and submitted, was again restored to the docket and reargued, and the conviction reversed, four Justices dissenting. Emphasis is laid in the opinion on the clause "without paying or accounting for the duty" in the statute then under consideration, and which is not found in the statute here involved; but beyond that the cases are distinguishable on the facts.

Stress is laid in that case on the fact that the goods "before or at the time when the obligation to pay the duty arose, were surrendered to the customs authorities" and on the fact that the antecedent acts outside of the country preparatory to the commission of the overt act of smuggling "were not followed by the introduction of the goods into the United States" (p. 443.) It is evident that the basis of the decision in the *Keck case* was that the mere bringing of the merchandise past the three-mile limit, and therefore technically within territorial waters, did not constitute smuggling, for the very moment occasion arose to surrender the merchandise for inspection and declare it the goods were produced and declared. The case at bar is quite different. In order to procure the introduction of the diamonds into the United States in his personal baggage in such a way as

to not only escape the duty but escape further inspection and the necessity for a formal declaration and invoice, Ritterman falsely declared to the customs officer at Montreal that his baggage contained no dutiable merchandise. After he crossed the boundary line he repeated to the customs officers on the train that he had no dutiable merchandise, and, finally, at the first port of entry, St. Albans, when questioned at the customs house he reiterated that he had no dutiable merchandise and particularly stated that he had left his diamonds at Montreal. By that time he had certainly reached the point where he was required to declare dutiable merchandise and invoice it, and pay the duty thereon. He did not "surrender" the merchandise to the customs officer, as was done in the *Keck case*. Ritterman's baggage containing the gems was seized by customs officers and taken from the train to the customs house at St. Albans without the assent of Ritterman, and evidently without his knowledge prior to the time he was asked for the key. Unlike the master of the vessel in the *Keck case*, Ritterman on reaching a point where declaration and payment of duty were required persisted in his efforts to escape the duty and deceive the customs officers. Under such circumstances it is not necessary that the customs officers shall pretend to believe the false statements and allow the suspected individual to leave the customs office with his baggage in order that the crime of smuggling be consummated, and we see no reason to

believe that there was any intent in the *Keck case* to hold that under circumstances such as are found here confession by the smuggler subsequently to or simultaneously with the discovery of the dutiable merchandise leaves him immune from punishment for smuggling.

It is believed that the case at bar falls more nearly within the facts of the case of *Newman* v. *United States*, 276 Fed. 798. In that case Newman, a passenger of the steamship *Stavangerford*, arrived in Brooklyn in February, 1920, and left the ship for the pier. An inspector of customs had Newman's baggage declaration and on the pier asked him if he had declared everything he had purchased or obtained abroad. Newman said he had declared everything. Later a customs inspector said to Newman, "I am going to give you one more chance. If you have anything on your person, or anything you bought abroad, and have not declared it, now is your time to declare it. I want to give you every chance in the world to make a declaration." To which Newman responded, "I have declared everything. Go ahead and search me, if you want to." The inspectors then accompanied Newman back aboard the ship, entered his cabin and searched him. Two fountain pens were removed from one of Newman's pockets. Noticing that the pen rattled the inspector asked Newman what was in the pen, to which he responded "Perhaps a couple of pieces of broken pen. It was

out of order for a couple of months," whereupon the inspector broke the pen and disclosed seven diamonds. Another pen was found on his person containing four diamonds. Finally after further pressing, the defendant Newman, took a box of tooth paste from his handbag, squeezed the tube and two more diamonds came out with the paste. The Circuit Court of Appeals in that case said (p. 800):

> * * * at a time when the customs officers not only had before them a false declaration, but in addition had physical possession of part of the smuggled goods, was it requisite that they should wait until the smuggler left the customs inclosure before they could apprehend him, on the theory that the crime was only then committed? Such a construction would make a mockery of the statute, and render it in large measure useless. In this case there was not an unexecuted purpose, nor a mere attempt to smuggle, as in the *Keck case*, supra. On the contrary, there is no similarity between the facts of that case and of this. Here the smuggling had been so fully executed that all that was left for Newman to do was to escape detection.

Petition for certiorari in the *Newman case, supra*, was denied by this Court (*Newman* v. *United States*, 258 U. S. 623), and this while the words "without paying or accounting for the duty" remained in the statute.

The decision in the *Keck case* was also influenced to some extent by the fact that at common law in England the offense of smuggling involved "landing" the goods and not merely bringing them inside the three-mile limit, and in the *Keck case* the diamonds had not been landed. In the *Keck case* no act or word of concealment or evasion of duty or failure to comply with law or regulations for one moment occurred after the vessel entered territorial waters.

The detection in this case took place after the crime had been consummated and not while it was a mere attempt. If smugglers clandestinely land merchandise at an isolated point on the coast with intention to evade the duty, their crime is consummated, notwithstanding customs officers observe them and arrest them and seize their goods before they have proceeded inland; and if suspected smugglers are found landing at an isolated point on the coast and customs officers observe them and require them to proceed to a customhouse near by for examination and inspection and the smugglers persist at the customhouse in denying possession of dutiable merchandise, subsequent search and detection of their possession of dutiable merchandise does not anticipate the consummation of the offense of smuggling. The case supposed differs in no essential from the case at bar. Ritterman was not headed for the customhouse. He had done his business with the customs officials at Montreal.

He was comfortably established in a train headed for New York, and his baggage containing the gems was on the train checked to New York, and, by virtue of the procedure theretofore taken under regulation 224, had been released from the necessity of further inspection. The removal of Ritterman and his baggage from the train to the customhouse was in effect compulsory. The crime here was detected, but it was nevertheless committed. The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
J. KENNEDY WHITE,
Attorney.
HARRY B. AMEY,
United States Attorney for Vermont.

DECEMBER, 1926.

APPENDIX

TREASURY DEPARTMENT
Customs Form 6059
ART. 295, C. R. 1923
T. D. 34125

UNITED STATES CUSTOMS SERVICE

DECLARATION AND ENTRY OF PERSONAL, HOUSEHOLD, IMMIGRANT, AND THEATRICAL EFFECTS, BOOKS, TOOLS OF TRADE, EFFECTS OF PROFESSIONAL LECTURERS, ETC.

No. . . . . , 192

District No. . . . . . , *Port* . . . . . , 192

I, the undersigned, declare that . . . . . and . . . . . his immediate
(Name) (Husband, wife, and minor children only)
family, are residents of the country of . . . . . and reside at . . . . .
(Number) (Street) (City) (State)
citizens of the country of . . . . . that said person or persons arrived on the . . . . . from
(Vessel or carrier)
. . . . . on . . . . . , 192 ; that the following . . . . . , owned by the
(Personal, household or immigrant effects, tools of trade, etc.)
above named, accompanied him or them *or arrived on the* . . . . . at . . . . . on . . . . . , 192 ; that I or we left the United States at . . . . . on . . . . . , 192 .

Packages, trunks, bags, etc.	DESCRIPTION OF ARTICLES CONTAINED HEREIN. List separately articles brought in for sale, for delivery to other persons, and United States articles altered or repaired abroad	Price paid or foreign market value	TOTAL DUTIES PER USE OF CUSTOMS OFFICERS. Quantities	Rate	Duty
	Articles obtained abroad for use of above-named persons				
	Articles for sale or use of other persons				
	Articles altered or repaired abroad	Cost of repairs			
	Personal effects taken out of U. S.				
No.	Total number of packages		Total duty		$

I further declare that all of the statements in this entry are true and complete; that all articles obtained abroad and brought or caused to be brought into the United States on said carrier by the above-mentioned persons are fully set forth above, and, with the exception of the articles listed otherwise, are for the sole use or wear of said persons, and were in the possession and use of said persons while abroad, and at the time of departure for the United States, and are necessary and appropriate for the wear or use of said persons; or for emigration to the United States, and are not to be sold, exchanged, or used in any manufacturing establishment, or otherwise used or disposed of in violation of the conditions permitting free entry; that such articles as are household effects were used abroad by said persons for not less than one year; that such articles as were taken from the United States and returned are in the same condition as when taken out, except such as were altered or repaired abroad, the cost of which alteration or repair is truly stated; and that the values stated on all articles obtained abroad represent the prices paid if purchased, otherwise the wholesale foreign market value as defined by law. I further declare, if declaration is made by me as an immigrant, that I intend to become a resident of the United States. I further declare, if this declaration is executed by me as agent, that all of the statements contained therein are correct and true to the best of my knowledge, information, and belief.

SF

_____
(Signature of owner, agent, or both)

Capacity _____ _____
(Owner or agent)

Declared to under oath before me this _____ day of _____, 192

_____
Acting Deputy Collector or Notary Public.

Articles for personal or household use and souvenirs or curios to the value of $100 may be brought in free of duty by returning residents of the United States, but must be declared. If this declaration, executed by the owner, is not produced at time of entry, bond on customs Form 7551 must be given for its production within three months from date of entry, and copy should be sent immediately to the owner for oath and signature. If value exceeds $100, consular invoice is required, except in case of personal effects accompanying the passenger.

This form may be used as a proforma invoice and manifest when necessary

FILED
OCT 31 1923

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 669

THE UNITED STATES OF AMERICA,

Petitioner,

v.

LEIB RITTERMAN.

RESPONDENT'S BRIEF.

ALBERT [illegible] C. BARNES, JR.,
Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1926.

THE UNITED STATES,
Petitioner,

v.

LEIB RITTERMAN.

RESPONDENT'S BRIEF.

Statement.

For his formal statement of facts, the respondent relies entirely on the statement in the opinion of the Circuit Court of Appeals (R., 77).

In the case at bar, regulations pertaining to passenger's baggage require that it shall be retained in customs custody until arrival "at the first port of entry" in the United States. Customs Regulations 1923, Art. 205, Art. 402. The first port of entry was St. Albans, Vermont (R., 20 and see T. D. 39867 abolishing Highgate and Swanton, and establishing the port of St. Albans). It was not until that time that any official entry could be made. It was at that time the customs officials deprived the respondent of the opportunity to make such entry by taking his baggage from the train, unknown to him, and concealing it in the Custom House in a place removed from that in which the respondent was held (R., 17-24-27-29-31-34). All of which was contrary to the law as set forth in the Treasury regulations which require that the baggage shall be

opened by the passenger in the presence of the Customs Officers. Customs Regs. 1923, Art. 205, Sec. 461, Tariff Act of 1922.

Summary of Argument.

1. Section 593, Tariff Act of 1922, is a substantial re-enactment of Section 2865, Revised Statutes and for the purposes of this action is exactly similar.

2. Smuggling or clandestine introduction was defined in Keck v. United States, 172 United States, 434, and that definition has never been questioned.

3. The Customs Officers did not comply with the law in apprehending the respondent and seizing his baggage.

4. The Circuit Court of Appeals reviewed the case of Newman v. United States, 276 Fed., 798 and expressly distinguished it from the case at bar.

Argument.

An "attempt to smuggle" is not a crime within any of the statutes of the United States.

The crime of smuggling as set forth in the statutes was fully defined in Keck v. United States, 172 United States, 434, as the clandestine introduction of merchandise without the payment of duties thereon. Entirely apart from the phraseology of Section 2865 of the Revised Statutes this crime of smuggling, as defined in the Keck case, included the failure to pay or account for duties. That case was decided upon two theories: First, that the statute did not include mere attempts to commit the crime of smuggling, and Second, that the clandestine introduction must be without paying or accounting for the duty. In view of the discussion of the definition of smuggling or clandestine introduction in that case, it is obvious that the decision would have been the same had the statute not contained the words, "without paying or accounting for the duty."

In the Keck case, *supra*, at page 445, this court said:

> "From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction."

Section 593 of the Tariff Act of 1922 being a substantial reenactment of Section 2865, of the Revised Statutes omitted the words "without paying or accounting for the duty," presumably upon the theory that smuggling or clandestine introduction had been defined in Keck v. United States, *supra*, and that such definition included, as a necessary part of the crime, failure to pay or account for duties. This definition has been the law for over twenty years.

The decision of the Circuit Court of Appeals is certainly not in conflict with its own decision in Newman v. United States, 276 Fed., 798. On the facts it was distinguished by that court from the case at bar (R., 82).

It is therefore respectfully submitted that the petition should be denied.

Respectfully submitted,

ALBERT MACC. BARNES, JR.,
of Counsel.

Office Supreme Court, U.
FILED
JAN 15 1927
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1926.

No. 669.

UNITED STATES OF AMERICA,

Petitioner,

v.

LEIB RITTERMAN.

BRIEF FOR RESPONDENT.

ALBERT MACC. BARNES, JR.,
Counsel for the Respondent.

JAMES M. SNEE,
with him on brief.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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aiders or abettors, shall be fined in any sum not exceeding $5,000 or imprisoned for any term of not exceeding two years, or both, at the discretion of the court.

STATEMENT OF THE CASE.

The Circuit Court of Appeals unanimously reversed the conviction and held that on the evidence there was reversible error in the instructions given the jury (R., 83); that the facts did not constitute the offense of smuggling under Section 593 (a), Tariff Act of 1922 (R., 79); that it was erroneous to adopt said section as the basis of the indictment on the evidence in this case (R., 83).

The Indictment.

Count 3 of the indictment, the only one submitted to the jury is as follows (R., 2):

> "Count 3. Lieb Ritterman of Antwerp, Belgium, on, to wit, the 28th day of January, A. D. 1926, at the towns of Highgate and Swanton, and at the City of Saint Albans, all in the County of Franklin, State and judicial district of Vermont, and within the jurisdiction of this court, did then and there unlawfully, wilfully, knowingly, and feloniously, with intent to evade payment to the United States of America of certain duties on certain merchandise, to wit, one thousand and twenty-two and eighty-five hundredths (1,022.85) carats of unset cut diamonds, of great value, to wit, one hundred twenty-two thousand four hundred ninety-two dollars and forty-three cents ($122,492.43) contained in one leather Gladstone bag, subject to the payment of duties to said United States, and thereby defraud said United States and the revenue thereof, smuggle and clandestinely introduce into said United States from a foreign country, to wit, the

Dominion of Canada, said merchandise, consisting of said one thousand twenty-two and eighty-five hundredths (1,022.85) carats of unset cut diamonds without making any declaration at any customs office of said United States, or to any customs officer of said United States, to enter said diamonds into said United States, and without causing said diamonds to be invoiced for the purpose of ascertaining the duties on said merchandise, consisting of said diamonds, at any customs office of said United States or by any customs officer of said United States, and without paying or accounting for the duties to which said merchandise, consisting of said diamonds, was then and there subject, although said Leib Ritterman had an opportunity to do so; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Facts.

On January 28, 1926, respondent went to the station of an international railroad in Montreal, Canada, carrying with him two hand bags, bought a ticket for New York, and took one of the hand bags, known in this case as the Gladstone bag, to the baggage room for checking to New York (R., 11, 12). A United States Customs Inspector asked him if the bag contained his personal effects and he answered affirmatively (R., 13). He was requested to open the bag and did so, and this United States Customs Inspector made an examination of the contents. The bag was closed and locked and corded and sealed with a United States Customs Seal (R., 12), the key and a baggage check handed to respondent who then proceeded (R., 13) to the train with the other small hand bag in his possession. Between Montreal, Canada, and St. Albans, Vermont, both on Canadian (R., 16) and United States territory (R., 17), respondent was asked by customs officers whether he had

anything to declare and in the case of each such inquiry answered "No." He was asked to open his baggage, and whether he had anything to declare, and he pointed to the small bag with him, stating "No, there it is," and it was twice examined (R., 16). But no reference was made to the Gladestone bag (R., 22). Yet all this time customs inspectors on the train had been going to the baggage car and inspecting the Gladstone bag and the United States Customs seals placed thereon in Montreal, so that at the time of each of the inquiries these customs officers knew of the presence of this sealed bag in the baggage car but did not ask respondent about it (R., 17, 21, 24, 27, 34).

Upon arrival at the customs port of St. Albans, Vermont, these inspectors, together with representatives of the Collector of Customs at that port, took the respondent and the small bag which he carried to the Custom House at St. Albans (R., 18), and kept him there in one of the rooms (R., 29) while they interrogated him as to whether he had anything to declare. In reply to these inquiries he answered "No" (R., 42, 46). They then began an examination of his person and the hand bag which he carried (R., 46), but at no time either showed to him, or referred in any way to the Gladstone bag which had been checked, and which under its customs seal had been in the custody of the customs officials since leaving Montreal (R., 24).

This Gladstone bag was taken from the train to the baggage room at St. Albans, and from there to another room in the Custom House (R., 24) somewhere across the hall from the one in which respondent was being examined (R., 29). The transportation of this bag and its concealment in the other room was without either the knowledge or consent of respondent. During the examination of the respondent's person, and when he had removed his hat, coat, overcoat, collar, and neck tie, the customs officers for the first time asked for the key of his bag which he produced and pointed out among others keys in a bunch (R.,

36, 37, 46). One of the customs inspectors took this key and departed. Respondent then stated to the Deputy Collector, "I want to talk to you alone" to which the inspector replied, "You cannot speak to me alone, take off that shoe" (R., 46). Respondent then made another request to speak to the Deputy Collector, saying, "I have got to speak to you alone," and upon that request the Deputy Collector said, "Come into the other room." This was not the room in which the Gladstone reposed (R., 29). There respondent said to the Deputy Collector (R., 47), "I haven't the diamonds on my person, they are in my grip." Another inspector was then called into this room and respondent repeated his statement in the presence of this other inspector (R., 47).

The Deputy Collector then continued with the examination of the person of the respondent, and his small hand bag. After the completion of the search of respondent's person one of the inspectors came into the room and stated that he and the other inspector who had obtained the key from respondent had found the diamonds in the grip as respondent stated (R., 47). Even then respondent was not shown his bag nor the contents thereof, nor did he see them after that time until the trial.

No evidence was offered on behalf of the respondent, and upon the facts stated he was convicted of the charge submitted to the jury.

On appeal to the Circuit Court of Appeals respondent contended:

> 1. That the facts presented by the Government did not constitute the crime of smuggling under Section 593 (a) of the Tariff Act of 1922, and that said section was not applicable to the facts of this case.
>
> 2. That the District Court committed error in charging the jury as follows, due exception having been taken thereto (R., 70):

"If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehall and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag."

3. That the indictment was fatally defective in failing to charge that the diamonds "should have been invoiced."

The Circuit Court of Appeals held that the facts as proven by the Government did not constitute the offense of smuggling under Section 593 (a) of the Tariff Act of 1922; that the District Court's charge to the jury as stated above was erroneous (R., 79); that the case was governed by the principle set forth by this court in Keck v. United States (172 U. S., 434), and on the 10th day of June, 1926, issued its mandate to the District Court for the District of Vermont reversing the judgment and conviction heretofore entered therein (R., 83) and on July 5, 1926, entered an order denying the petition of the petitioner herein for a rehearing (R., 83).

The Questions Before the Court.

The questions before the court may be set forth as follows:

1. Where an indictment charges smuggling of merchandise "subject to duty * * * without paying or accounting for the duty," is the crime of smuggling committed until the obligation to pay or account for the duty arises?

2. Does Section 593 (a) of the Tariff Act of 1922 cover articles carried on the person or in the baggage of passengers from territory contiguous to the United States?

3. Did not the failure to aver in the indictment that these diamonds were "merchandise which should have been invoiced" make the indictment fatally defective?

4. Can the Secretary of the Treasury by rules and regulations extend the scope of a criminal statute as is attempted to be done in this case under Article 224 of the Customs Regulations of 1923?

5. Did respondent on the facts proven by the Government in this case commit the crime of smuggling under Section 593 (a) of the Tariff Act of 1922 as charged in the indictment?

Summary of the Argument.

The administrative provisions of the Tariff Act of 1922 were an attempt to consolidate and re-enact all prior statutes governing the enforcement of the Customs laws.

Section 2865 R. S. was the smuggling statute. It had been construed by this court in Keck v. United States, 172 U. S., 474. It was re-enacted with some omissions as Section 593a of the Tariff Act of 1922, as a part of that consolidation plan.

The Keck case produced two conclusions. First—that the statute does not include attempts to smuggle. Second—that there can be no crime of smuggling until the obligation to pay duties arises.

Although the second conclusion is based partly on the phraseology of the statute, i. e., "without paying or accounting for the duty," which words have been omitted from the present statute—the action of the Government in the case at bar in charging this very omission in the indictment, creates the same question as that passed on in the Keck case.

This second conclusion however, is based upon the definition of "smuggling" as including within it, the avoidance of the obligation to pay or account for duties and the phraseology used in Section 2865, Revised Statutes is cited by this court only as corroborative of the definition which the court adopted.

The Tariff Act of 1922 and the Customs Regulations promulgated thereunder show a pronounced line of demarcation between ordinary commercial merchandise shipments and passengers' baggage. They make a further distinction between passengers' baggage from contiguous territory and from all other places.

All merchandise shipped in the ordinary commercial way must be invoiced and must also be declared in writing on entry.

Passengers' baggage need not be invoiced and the declaration thereof may be oral.

All baggage or other articles from Canada must be unladen and inspected *at the first port of arrival* in the United States. There, only, the obligation to enter, which has been defined in the Customs Regulations as "the transaction of passing merchandise through the Customs" can arise. In the case at bar respondent at that time was deprived of his baggage.

Customs Regulations of 1923, Articles 205 and 395 both provide that Customs Officers shall not open the baggage of passengers. Neither of these regulations was regarded by the officers in this case, who, without the respondent's knowledge and consent removed the Gladstone bag from the baggage car and concealed it in a room in the Custom House at St. Albans (R., 24) other than that in which the respondent was being examined (R., 29) and later after asking respondent for the key thereto proceeded to this other room and opened the bag with the key supplied (R., 37). The law contemplates examination of baggage in the presence of the passenger and this right of the passenger was totally disregarded.

In conducting the search of his person (R., 46), also without referring to the bag, at which time and before any obligation on his part arose to pay the duty, and before the search was completed, respondent mentioned to the Collector who was conducting the search, that in his Gladstone bag, the key to which was shortly before that time requested, were certain diamonds (R., 47).

Under these circumstances, and on the authority of the Keck case and the various decisions of the Circuit Courts of Appeal, the respondent made due entry of the diamonds and did not commit the crime of smuggling under Section 593 (a) of the Tariff Act of 1922.

On the authority of the rule evolved in the Keck case and followed by the lower courts, and in view of the laws and regulations existing at the time respondent entered the United States, and in view of the conduct of the customs officers, and in view of all the evidence adduced in the case at bar, the part of the charge of the District Court objected to was reversible error and the instructions of the court, if any, should have been the direction of a verdict of acquittal.

But notwithstanding the above rule, under Section 593 (a) the indictment as drawn is fatally defective in that it fails to charge that diamonds were merchandise "which should have been invoiced."

This is a material allegation and the omission in the present indictment renders the same invalid. The term "which should have been invoiced" is not merely descriptive but is one of the essential averments which must be proved to sustain a conviction under this section. This averment has been held to be so essential that an indictment under the 19th Section of the Act of August 30, 1842, which is the same substantially as 593 (a), was quashed, where the facts averred were the smuggling of goods from Canada on the ground that there was no requirement that goods coming in from Canada should be

invoiced, the only requirement at the time of the case being that a manifest be made at the first Custom House in the United States.

The averment "without causing said diamonds to be invoiced" is not equivalent to the clause "which should have been invoiced."

The former is a mere statement of an omission on the part of the respondent, the latter is an essential description of the goods themselves which informs the person indicted of the character or class of the goods he is alleged to have smuggled.

Section 593 (a) is distinctly a commercial merchandise provision which has no relation to passenger's baggage brought in from Canada.

ARGUMENT.

Section 593 (a) of the Tariff Act of 1922 provides as follows:

> "SMUGGLING AND CLANDESTINE IMPORTATION.—(a) If any person knowingly and wilfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces, into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the custom house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

Section 2865 Revised Statutes was the statutory predecessor of Section 593 above and it provided as follows:

R. S.—Sec. 2865.—"For Issuing False Invoice.—If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

At the time of the enactment of the Tariff Act of 1922, it was sought to consolidate in the administrative provisions of that act all the statutes relating to the enforcement of customs laws. Section 593 (a) was drawn and enacted to cover the crime of smuggling as it had been described in Section 2865 of the Revised Statutes and prior acts.

Section 2865 of the Revised Statutes reads: "*subject to duty by law, and which should have been invoiced, without paying or accounting for the duty.*" (Italics ours.)

Section 593a of the Tariff Act of 1922 contains only the provision "*which should have been invoiced.*" (Italics ours.)

It is obvious that Section 2865 of the Revised Statutes would not have supported a conviction for smuggling free merchandise, nor merchandise of a class permitted to be imported for exhibition purposes, nor animals for breeding purposes, none of which are subject to duty and none of which could be said to have been introduced "without paying or accounting for the duty." It probably would not have covered prohibited merchandise.

It was the evident desire to overcome this lack of scope of Section 2865, Revised Statutes which prompted Congress to omit from Section 593 (a) of the Tariff Act of 1922, the words "subject to duty by law," and the words "without paying or accounting for the duty" and to insert in their stead only the words "merchandise which should have been invoiced," adopting at the same time the judicial interpretation of the meaning of the words "smuggling" or "clandestinely introducing" as including the avoidance of the obligation to pay or account for the duty, interpreting this as rendering the inclusion of the words "subject to duty" and without paying or accounting for the duty as unnecessary.

Section 593 (a) would probably support a conviction for the smuggling of *any* merchandise no matter whether free or dutiable, permitted or prohibited, provided it was of the kind *which should have been invoiced.*

In Keck v. United States, 172 U. S., 434, the indictment charging smuggling under Section 2865, Revised Statutes contained the following averments:

> "• • • did knowingly, wilfully, unlawfully with intent to defraud revenue • • • smuggle and clandestinely introduce • • • certain diamonds • • • which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of Keck and with intent to defraud • • • were not invoiced nor the duty paid or accounted for."

Count 3 of the indictment in the case at bar (supra), page 2, contains the following averments:

> "• • • did • • • unlawfully, wilfully, knowingly, and feloniously, with intent to evade payment • • • of duties • • • subject to the payment of duties to said United States and thereby defraud said United States and the revenue thereof, smuggle and clandes-

> tinely introduce * * * said merchandise * * * without making any declaration at any customs office * * * or to any customs officer, * * * to enter said diamonds into said United States, * * * without causing said diamonds to be invoiced for the purpose of ascertaining the duties on said merchandise, * * * and without paying or accounting for the duties, to which said * * * diamonds, was then and there subject, although said Leib Ritterman had an opportunity to do so. * * *"

It will thus be seen that although the words "subject to duty" and "without paying or accounting for the duties" were omitted from Section 593 (a) of the Tariff Act of 1922, both of these elements of the crime were included among the averments of Count 3 of the indictment in the case at bar.

It is therefore apparent that while Congress broadened the scope of Section 2865 R. S. in its enactment of Section 593 (a), the Government by the averments in Count 3 of the indictment has narrowed the scope of Section 593 (a) to exactly the crime covered by Section 2865, and which formed the basis of the indictment in Keck v. United States (supra).

It may then be safely said that the indictment in the case at bar and the indictment in Keck v. United States cover exactly the same crime charged in almost exactly the same words, and that the disposition of the indictment in Keck v. United States must necessarily be the disposition of the indictment in the case at bar.

One, at least, of the conclusions reached in the Keck case applies directly to Section 593 (a). This court there said:

> "Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law:

FIRST.—That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense referred to. It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offense and its actual commission. If this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offense would become the offense itself; that is to say, that one would be guilty of an offense without having done the overt act essential to create the offense, because something had been done which, if carried into further execution, might have constituted the crime. Second. That the smuggling or clandestine introduction of goods referred to in the statute must be 'without paying or accounting for the duty,' is also beyond question.

"From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting clandestine introduction. From the second, it results that as the words, 'without paying or accounting for the duty' imply the existence of the obligation to pay or account at the time of the commission of the offense, which duty is evaded by the guilty act, it follows that the offense is not committed by an act done before the obligation to pay or account for the duties arises, al-

> though such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. If this were not a correct construction of the statutes, it would result that the offense of smuggling or clandestine introduction might be committed as to goods, although entry of such goods had been made and all legal duties had been paid before the goods had been unshipped."

The first conclusion reached by the court has no reference whatever to the words "without paying or accounting for the duty," which words were omitted from Section 593 (a). Had Congress seen fit, following the decision in the Keck case, to remedy this defect in the law, it would have been a simple matter to have included within the terms of Section 593 (a) the crime of attempt to smuggle. The failure of Congress to do so, and the enactment of Section 593 (a) in substantially the same form as Section 2865 was such a legislative adoption of judicial decree or interpretation as to leave no doubt that Section 593 (a) was not intended to cover and did not cover such a crime as attempt to smuggle. Latimer v. United States, 223 U. S., 501.

It seems self evident that all the preliminary acts or omissions indulged in by the respondent in Montreal, on the train in Canada and the United States, and within the customs lines at St. Albans, were, as this court stated in the Keck case "but steps or attempts not alone in themselves constituting clandestine introduction."

Although the acts of the respondent may have tended to render possible a subsequent smuggling they can be construed as nothing more than attempts which did not merge into the completed crime by the commission of the necessary overt act, that is, the completion of the entry of the baggage without having disclosed the presence of the diamonds.

To obtain a proper perspective of this situation it is necessary to review the portions of the Tariff Act of 1922

having to do with the enforcement of the Customs laws, and to set forth at the same time those rules and regulations promulgated by the Secretary of the Treasury to carry such laws into effect.

It may first be stated as a general proposition that *entry* must be made of all merchandise, whether dutiable or free, and regardless of its value. (See Customs Regulations 1923, Article 255.)

Article 265, Customs Regulations of 1923 provides:

> "The term 'entry' has two meanings: First, the document filed in the Custom House, and second, the transaction of passing merchandise through the customs.
>
> The date of the entry in the first sense is the date the completed document is properly filed in the Custom House during office hours.
>
> The date of the entry in the second sense is the date when the custody of the Government ceases on imported merchandise."

The first class of entries has to do with the usual commercial importations and consists of a document according to a prescribed form which must be signed and declared to.

Section 484 of the Tariff Act of 1922 provides:

> "SEC. 484. ENTRY—(a) Except as provided in sections 490, 498, 522 and 553 and in subsection (d) of section 315 of this Act, the consignee of imported merchandise shall make entry therefore either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the Custom House *within forty-eight hours*, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival

at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time."

(b) No merchandise shall be admitted to entry under the provisions of this section without the production of a certified invoice therefor." * * *

Section 498 of the Tariff Act of 1922 is an exception to the provisions of Section 484 and provides:

"The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of—

(6) Articles carried on the person or contained in the baggage of a person arriving in the United States."

"(b) The Secretary of the Treasury is authorized to include in such rules and regulations any of the provisions of Sections 484 or 485 of this Act."

The Secretary of the Treasury under the power conferred by Section 498 has not seen fit to include in the baggage regulations any of the provisions of either Section 484 or 485.

The Secretary did, however, under the authority of Section 498, promulgated Article 247, Customs Regulations 1923 which provides among other things, that "*consular invoices will not be required*," for (italics ours)—

"(6) Articles carried on the person or contained in the baggage of a person arriving in the United States."

Section 461, of the Tariff Act of 1922 provides:

"All merchandise and baggage imported or brought in from any contiguous country, except as otherwise

provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which the same shall arrive; *and such officer may require the owner*, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise or other container, or of any closed vehicle, to open the same for inspection or *to furnish a key* or other means for opening the same." (Italics ours.)

The penalty for failure to comply with the provisions of Section 461, supra, are set forth in Section 462 of the Tariff Act of 1922.

Section 462 Tariff Act of 1922 provides:

"If such owner, agent, or other person *shall fail to comply with his demand*, the officer shall retain such trunk, traveling bag, sack, valise, or other container or closed vehicle, and open the same, and, as soon thereafter as may be practicable, examine the contents, and if any article subject to duty or any article the importation of which is prohibited is found therein, the whole contents and the container or vehicle shall be subject to forfeiture." (Italics ours.)

The Secretary of the Treasury under the authority conferred by Sections 498 and 461 of the Tariff Act of 1922 promulgated Articles 205 and 224 of the Customs Regulations of 1923.

Article 205, provides:

Art. 205 "INSPECTION—PENALTY.—All merchandise and baggage imported or brought into the United States from contiguous foreign territory, unless destined to an interior port in bond, shall be unladen in the presence of and inspected by a customs officer *at*

the first port of entry at which same shall arrive. Customs officers may require the owner or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open same for inspection, to or furnish a key or other means for opening same.

Customs officers *should not open baggage* for the purpose of examining the contents. All baggage which is not opened by the owner or his agent should be held for examination until so opened, or a request received from the owner or his agent to make proper disposition thereof.

In the event the owner, agent, or person having charge of such container refuses to comply with the demand of the customs officer to open same, or produce the means of opening same, such container shall be retained in the custody of the customs, and examined as soon thereafter as practicable. On inspection, should any article subject to duty, or any article the importation of which is prohibited, be found, the whole contents, and the container or vehicle, shall be subject to forfeiture.

Declaration on Customs Form 6063 will be required for articles acquired abroad exceeding $25 in value.

For procedure relative to baggage moving forward under Bond from port of first arrival, see Article 402." (Italics ours.)

Much stress has been laid by the learned counsel for the United States on the portion of this transaction which took place in Montreal under the provisions of Article 224 of the Customs Regulations.

Article 224 provides:

ART. 224. "BAGGAGE EXAMINED ABROAD—DISPOSITIONS AT FIRST PORT OF ARRIVAL.—Baggage examined by inspectors of the United States customs stationed

at places in the Dominion of Canada, if containing no dutiable merchandise, will be corded, sealed, and forwarded under special manifest as herein provided, or placed in a sealed car or compartment and accompanied by a sheet manifest.

Dutiable articles and exemptions allowed, if any, will be indorsed on the manifests by examining inspectors for the information of the collector at the first port of arrival in the United States.

* * * * * * * * *

* * * * * * * * *

The card manifests will be placed on the cords back of the seal. When the inspector boards a train at the first port of arrival of the baggage, he will cut the cord and retain the manifest for filing in his office."

The foregoing Article of the Regulations providing for examination of baggage outside the territorial limits of the United States, while it may be justified as a convenience to passengers and to the Government, cannot have the force and effect of a statute. It is at best a permissive regulation, and certainly by no interpretation of the doctrine of legislative delegation of power, can it have the effect of making criminal that which was not criminal by the terms of the statute itself. (See United States v. Standard Brewing Co., 251 U. S., 210; 64 L. Ed., 229, also Eaton v. United States, 144 U. S., 677, 36 L. Ed., 591.)

In any event the only act by the Government officers in this case even remotely connected with Article 224 of the Regulations was the careful examination and sealing of this Gladstone Bag in Montreal (R., 12). From that moment on, the respondent and his hand baggage, as well as the Gladstone bag in the baggage car and at the Custom House, were handled in accordance with Article 205 of the Regulations, with the single exception that these Government officers followed the practice at the border ports of encouraging the making of oral declarations in-

stead of requiring written declarations on customs forms 6063 or 6059 (R., 16).

In the case at bar the first port of entry at which respondent arrived after leaving Canada was St. Albans, Vermont. (See Treasury Decision 39867, Appendix.) This was also the first scheduled stop of the train upon which respondent travelled, after leaving Canada (R., 20). The conductor or other person in charge of this train was required by Section 459 of the Tariff Act of 1922 to immediately report his arrival to the customs officer at the port of entry nearest to the place at which he crossed the boundary line and to produce to such customs officer a manifest. Respondent's Gladstone bag which was in the custody of the Government under customs seals placed thereon in accordance with Article 224 of the Regulations and manifested by the customs inspector at Montreal (R., 13) enabled the conductor or person in charge of this train to comply with the requirements of Section 459 and Section 460 of the Tariff Act of 1922, and to deliver a properly manifested article to the customs officers at the first port of arrival in the United States, that is, St. Albans.

Upon arrival at St. Albans the respondent could have taken advantage of the provisions of Article 402, Customs Regulations of 1923 to request the transportation company to forward this Gladstone bag under cord and seal and manifest, without examination or assessment of duty, to the port of New York as its ultimate destination. See Article 402, Customs Regulations, which provides:

> Art. 402. "SHIPMENT OF BAGGAGE IN BOND—MANIFEST.—When baggage appears by manifest of the importing vessel, or other satisfactory evidence, to be destined to a port of entry *other than the port of arrival*, it may be forwarded to its destination at the request of the passenger, the transportation company, or the agent of either, under cord and seal and bag-

gage manifest described below, without examination or assessment of duty. * * *"

While respondent had the right at this time to send his bag on to New York he did not have the opportunity as he did not see the bag, nor was he informed that it had even arrived at the port of St. Albans (R., 24).

Certainly at the port of St. Albans respondent could *not* have taken his Gladstone bag out of customs custody without a permit from the customs authorities as provided in Section 459 of the Tariff Act of 1922.

The statutes and the Regulations require that passengers' baggage from Canada shall be unladen and examined at the first port of entry in the United States, and that *there* duty, if any be due, should be paid, and that *there* entry, if any is to be required, must be made. None of these things happened in the case of the respondent. They were not permitted to happen.

These customs officers intent on making what they called a "positive case" (R., 20), unlawfully seized respondent's Gladstone bag from the baggage car or the baggage room of the railroad, and unlawfully and surreptitiously transported it to the Custom House at St. Albans (R., 20).

Contrary to what the learned Solicitor General for the United States so earnestly contends, respondent did not at any time have the slightest chance to have his Gladstone bag go through on the baggage check to New York.

These diamonds in their little paper packages take up quite a space, probably as much as the ordinary copy of the Federal Reporter. In their paper packages they make quite a rustle when moved. They were in these paper packages, with the exception of a very few, when the inspector at Montreal made his careful examination of this Gladstone bag. The only reason which can be advanced for this inspector not discovering some of these packages, in view of the fact that he had been told to watch for this

man (R., 14, 15), was that the inspector did not want to discover them. He wanted to allow this respondent to cross the border into the United States so that a so-called "positive case" could be made against him there.

Let us see then how this positive case idea was carried out in the Custom House at St. Albans.

Section 461 of the Tariff Act of 1922, and Article 205 of the Regulations specifically direct customs officers not to open baggage for the purpose of examining the contents. It further requires that the baggage shall be *unladen in the presence of, and inspected by customs officers at the first port of entry at which the same shall arrive*, and that such officers may require the owner of the baggage to supply a key for opening same, if the owner will not, or cannot, open the baggage himself. The *only penalty* provided in the law for the failure on the part of the passenger to comply with this request is the retention of the baggage in the custody of the customs and the examination at a later date, in which event should any article subject to duty be found the whole contents and the container shall be subject to forfeiture.

Article 395, Customs Regulations of 1923 providing for the examination of baggage and the collection of duties also states: "Customs officers will not open baggage for the purpose of examination. Any package which is not opened by the owner or his agent for examination should be treated as unclaimed."

There are good reasons for these requirements, the most important of which is that the opening of baggage by the owner, or by the customs officer in his presence, prevents the possibility of so-called "framed" cases by the insertion in such baggage of dutiable articles by someone other than the owner.

The respondent was taken from the train at St. Albans under guard to the Custom House and sequestered in a room therein (R., 18, 42). He was examined by various customs officers as to whether he had anything to declare

and specifically whether he had any diamonds to declare (R., 42, 46). He did not see, nor was he permitted to know, that the Gladstone bag was in the Custom House in another room, nor that it had even left the baggage car of the train upon which he had arrived (R., 29). Thus was committed by the customs officers charged with the enforcement of the law a breach of respondent's rights, and a violation of the statute and the regulations thereunder.

It was not until respondent was asked for the key to his Gladstone bag, that the baggage which started out under Regulations, Article 224, and was then proceeding under Regulations, Article 205, did he realize that these questions which were being directed to him might include the bag which had been examined by the customs inspector at Montreal and had been continuously in customs' custody since that time. At this moment, and before his examination and the inspection of his person were completed, he volunteered the information to the proper customs officers that he had diamonds in the Gladstone bag (R., 46, 47. No question could possibly arise under the circumstances in this case as to whether the diamonds were actually discovered by the customs inspector in another room across the hall before or after respondent mentioned them to the Deputy Collector, because the respondent had no means of knowing what these other inspectors were doing, and his voluntary declaration was made, before the Deputy Collector who was examining him could possibly have known that the diamonds had been discovered (R., 47).

The law does not contemplate an examination of different articles, in different places, away from the passengers, by different officers at the same time.

This question of voluntary disclosure even after denial of the existence of dutiable merchandise on the passenger's person, or in his baggage, has been the subject of a number of decisions.

In United States v. One Pearl Chain, 139 Fed., 510, Judge Holt, in directing a verdict for the defendant, made the following significant statement:

> "The article in this case is one of great value, but, of course, it is governed by the rules and regulations applicable to the importation of baggage, or articles upon the person. * * *
>
> As I look at the law in this case, the question of intent is immaterial * * * *if the persons who brought the goods here intended to smuggle them, they had an opportunity to change their minds down to the time when it was their duty to make the necessary declaration;* and in my opinion the Government cannot seize these goods as forfeited until the time has come when the person importing them has had an opportunity to declare them and has not done so. In my opinion, there is no evidence in this case that that time had come, and, therefore, I think there should be a verdict directed in this case for the claimant, and I will so direct." (Italics ours.)

In affirming that decision in 139 Fed., 513, the Circuit Court of Appeals for the Second Circuit stated the case and its decision as follows:

> "*Before she was called upon by the inspector to open her trunks and give him the information which her imperfect prior declaration made it her duty to give*, Theobold, the Special Treasury Agent, approached her, told her that he knew she had purchased a Pearl Necklace in Paris, which she had omitted to declare, and asked her to produce it. He testified, 'She at first said that she had one of her necklaces mended at Tiffany & Company's, and that she had not purchased any necklace, but being further pressed, said she had purchased a necklace.' In response to

his request that she produce it, she returned on board with him and her husband and gave it to him. (Italics ours.)

Thereupon he put it in his pocket and walked away with it. The fact that her jewelry had been thus seized and removed by officers of the Government was presumably the reason why she did not complete the entry by having the pearl chain added to the embroidered linen and the wearing apparel, and, in our opinion, she could not under such circumstances be held for failure to make declaration of entry; as was said in the Dodge case, 111 Fed., 165, 49 C. C. A. 287, 56 L. R. A., 130, 'If they make such an examination and find in the baggage and articles which they deem dutiable, they are to require due entry of them to be made, together with payment of the duties. If instead of requiring the passenger to make due entry of dutiable articles which such passenger produces, they elect to seize and remove them before the passenger is called upon to complete his entry, he is not to be held responsible for failure to include them in the itemized entry, provided he has mentioned them to the customs officer when he first made his entry.'" (Italics ours.)

Judge Wallace in a concurring opinion says (p. 517):

"It was seized upon her person, however, before any obligation on her part had arisen to pay or account for the duties. I agree, as the Supreme Court has so decided in the Kock case, that *until the obligation to pay or account for the duties arises the offense of smuggling is not complete* and no cause of forfeiture accrues." (Italics ours.)

In the case at bar, the obligation to pay or account for duties arose first at the custom house at the Port of St. Albans. These diamonds were not accompanied by a consular invoice and they were valued at over $500. Conse-

quently Article 395, Customs Regulations of 1923 requires regular entry at the custom house and regular appraisement. (See Article 395 set forth in Appendix, page 35.) The obligation on the part of respondent could not therefore arise until some time after the opening of the Gladstone bag and the appraisal of its dutiable contents. *Before this time arrived respondent declared the diamonds.* The Government does not claim that these diamonds could have been entered and appraised and duty paid prior to arrival at the Custom House at St. Albans.

In United States v. One Trunk, 184 Fed., 317, the Circuit Court of Appeals for the Second Circuit, speaking through Lacomb, Circuit Judge and citing U. S. v. One Pearl Necklace, 111 Fed., 164, 49 C. C. A., 287, 56 L. R. A., 130, and One Pearl Chain v. U. S., 123 Fed., 372, 59 C. C. A., 499; Dodge v. United States, 131 Fed., 849, 65 C. C. A., 603; United States v. One Pearl Chain, 139 Fed., 513, 71 C. C. A., 500, said at page 318:

> "we reached the conclusion that *if at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger, which is sufficient to put the customs officers upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were mentioned to the collector before whom such entry was made.*" (Italics ours.)

The Pearl Chain case is on all fours with the case at bar. In both cases questions were asked of the passenger as to whether he had anything to declare; in both cases the passenger's answer was in the negative; in both cases subsequent questions of the same kind were asked and again denied; in both cases customs officers took the article or package out of the possession of the passenger prior to, or at the time when the obligation of the passenger to mention to the customs officers the dutiable articles and

pay the duty arose; in both cases the customs officers rendered it impossible for the passenger to so declare and pay duty; in both cases the passenger changed his mind about smuggling; in both cases the passenger voluntarily gave up the articles or property upon request therefor, and *before such articles or property had been discovered by the customs officers.* All these cases were before the Circuit Court of Appeals when the case at bar was decided by it and the principle enunciated thereunder was ratified and approved in its decision of the case at bar.

The learned counsel for the United States have cited the case of Newman v. United States, 276 Fed., 798, decided by the Circuit Court of Appeals for the Second Circuit, and contends that it is on all fours with the case at bar. The Newman case is representative of the class of cases distinguishable from those hereinbefore cited by one fact. This fact forms the single line of demarcation between the crime of smuggling and the mere unexecuted attempts to smuggle. The Newman case and those cited in connection therewith are all based upon the fact that dutiable articles *were found by the customs officers prior to any mention thereof by the passenger.* As was said in Dodge v. United States, 131 Fed., 849, the passenger did not *"while the entry was being made nor before it was completed make any declaration to the customs officer sufficient to put him upon inquiry as to the dutiable character of any of the contents of the packages of baggage*, and that subsequently upon examination of her hand bag the jewelry *was found.*

Respondent's Gladstone bag was produced to the customs officers, and consequently it could not be said that it was concealed or clandestinely introduced into the United States in any manner. Respondent had not passed the customs lines, nor had he completed his entry in the meaning of that term as defined in Art. 265, Cust. Reg. 1923, when he made the declaration of the dutiable articles.

Section 462 of the Tariff Act of 1922, providing for forfeiture in case the owner of baggage shall fail to comply

with the demand for the production of a key to open his baggage continues as follows:

> "And if any article subject to duty, or any article, the importation of which is prohibited *is found therein*, the whole contents of the container shall be subject to forfeiture."

Thus Congress has recognized the difference between a *disclosure* of dutiable merchandise and a *finding* thereof by customs officers.

If the principle evolved in the Keck case and followed by the Circuit Court of Appeals since, be the law, then it follows as a matter of course that the charge to the jury by the District Court as follows:

> "If you find that the defendant falsely and fraudulently, intending to defraud the revenue of the United States, told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this completed the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the Customs House, he admitted that he had some diamonds in his Gladstone bag,"

was reversible error, and the decision of the Circuit Court of Appeals should be affirmed.

Count 3 of the indictment is fatally defective in that it fails to allege that the diamonds were merchandise "which should have been invoiced." Section 593 (a) is distinctly a commercial merchandise provision which has no relation to passenger's baggage brought in from Canada.

Not only does Section 593 (a) provide for the clandestine introduction into the United States of "any merchandise which should have been invoiced," but provides for the making out, or passing, or attempting to pass through

the Custom House any false, forged, or fraudulent invoice. This provision is one of the material elements of which this particular offense is composed.

All the merchandise which Section 593 (a) can cover, including dutiable goods, free goods, goods in bond for export, American goods returned, prohibited goods imported on a permit, goods for exhibition purposes, cattle for breeding purposes, is required to be invoiced.

Passengers' baggage as shown above is *not* required to be invoiced.

That the words "which should have been invoiced" constitute a material element of the crime is set forth in Section 593 (a), is supported by the case of United States v. Smith (2 Blatchford, 127, 27 Fed. Case No. 16319), in which Mr. Justice Nelson of the Supreme Court of the United States, sitting in Circuit, on Error to the District Court of the Northern District of New York, *held* that the provisions of the Tariff Act of 1842 (which were exactly the same as the provisions of Section 2865 of the Revised Statutes) applied only to merchandise *which should have been invoiced*, and that as the Act of 1821 contained no provision for the invoicing of merchandise from Canada, such merchandise was not subject to a smuggling charge under that statute. The court said:

> "It is apparent that an *essential element* to constitute the offense under the 19th Section of the Act of 1842 is wanting in the importation of goods provided for in the Act of 1821. *There is nothing in the latter act requiring that they should be invoiced.* The system is a distinct one applicable to the frontiers adjacent to foreign territories. I am constrained, therefore, to differ from the court below, and to reverse the judgment there rendered." (Italics ours.)

Also in

> U. S. v. Nolton, 5 Blatch., 427, 27 Fed. Cases No. 15,897.

In the Circuit Court on Error to the District Court for Northern District of New York, July 11, 1867, the rule was restated.

This was a motion to quash an indictment against George B. Nolton for smuggling, founded on the 19th Section of the Act of August 30, 1842 (5 Stat., 565). The gravamen of the indictment was, smuggling from Canada into the collection district of Cape Vincent in the North District of New York, the indictment charged that the goods were liable to duties and *should have been invoiced* and the duties paid, but that they were brought in without an invoice and without the payment of duties.

Nelson, Circuit Justice.

The objection to the indictment is that the 19th Section of the Act of Aug. 30, 1842, does not apply to the case of goods imported from an adjacent foreign territory; and that such importations are governed by the Act of March 2, 1921 (3 Stat., 616) which requires only that a manifest of the goods, duly verified, shall be delivered to the Collector, and the duties paid, and that, in case of default, the goods shall be forfeited, together with the vessel or vehicle, and the party subject to a penalty of $400, altered and increased by the Act of March 3, 1923 (3 Stat., 781) to a penalty of four times the value of the goods. • • •

The omission of the words "which should have been invoiced" from the averments of the indictment constituted a failure to charge a crime with that degree of precision demanded by Congress. In the case at bar, the inclusion of this clause in the indictment would have advised the defendant that he was charged with smuggling merchandise for that is the only class of imported articles required to be invoiced. It would thus have brought the crime charged within the provision of the Tariff Act of 1922

and the Regulations thereunder having to do with merchandise and particularly would it have brought the crime charged within the provisions of Article 247 of the Customs Regulations of 1923 which give to the importer a period of forty-eight hours within which to make his entry after arrival at the first port of entry.

If these diamonds were merchandise "which should have been invoiced" then respondent was deprived of the legal period of forty-eight hours within which to make his entry by the unlawful seizure of this Gladstone bag by the Customs Officers.

If it was not intended to charge that these diamonds were "merchandise which should have been invoiced" then the averments of the indictment having to do with smuggling and clandestine introduction are not applicable to the state of facts shown to exist, as respondent brought into the United States only passengers' baggage.

The conclusions which may be drawn from a study of the Tariff Act of 1922 and of the regulations promulgated thereunder and which are justified under the facts in the case at bar, are:

1. That no invoice is required for passengers' baggage from Canada.

2. That no written declaration is required.

3. That baggage brought in under the regulations, Article 224 is in Government custody until delivered to the passenger at the first port of entry in the United States.

4. That at the first port of entry in the United States occurs for the first time the obligation to make entry and that entry must be understood to be the transaction of passing goods through the customs.

5. That the obligation to pay or account for duties does

not occur until arrival at the first port of entry in the United States and then only after examination and appraisal of the goods.

6. That such baggage must be inspected at the first port of arrival in the United States, and the only obligation on the passenger is to open it or to supply the key for that purpose.

7. That the only penalty for failure to comply with the request to open the baggage, or furnish a key therefor, is the forfeiture of the baggage, provided articles subject to duty or prohibited importation are found therein, and it should be noted that this provision of Section 462, Tariff Act of 1922 is limited to such dutiable articles as are "found therein." This unquestionably negatives the imposition of such a penalty in any case where, as was held by the Circuit Court of Appeals in the case of United States v. One Pearl Chain, supra, the presence of such dutiable merchandise or goods *is disclosed by the passenger, prior to the time of the completion of the examination.*

8. That the respondent having declared or mentioned to the Deputy Collector the existence of dutiable merchandise before his examination was completed and consequently during the process of making entry of his baggage, was not guilty of the crime charged in the indictment.

9. In the case at bar, the obligation of respondent was to have made a disclosure of the dutiable contents of the Gladstone bag, and, if the merchandise therein be considered passengers' baggage, he should have been permitted to have it appraised and pay duty thereon provided he either opened the bag at the request of the customs officers or supplied them with a key to open same. If, as was decided by this court in United States v. One Pearl Chain,

supra, the customs officers seized the bag before he had an opportunity to open it, or to advise the customs officers of dutiable goods contained therein, then he was not guilty even of an infraction of Section 461 of the Tariff Act of 1922, and much less was he guilty of the crime of smuggling as set forth in Section 593 of the Tariff Act of 1922.

Respectfully submitted,

ALBERT MACC. BARNES, JR.,
Counsel for the Respondent.

JAMES M. SNEE,
on the brief.

APPENDIX.

Treasury Decision 39867 provides as follows:

To Collectors of Customs and Others Concerned:

"Treasury Department, November 20, 1923.

There is published below for the information of customs officers and others interested an Executive Order issued November 13, 1923, abolishing the ports of St. Albans, Swanton, and Highgate, and creating the port of St. Albans to include the townships of St. Albans, Swanton, Highgate, and Franklin, effective December 1, 1923:

Executive Order.

By virtue of the authority vested in me by the act of Congress approved August 1, 1914, making appropriations for the sundry civil expenses of the Government for the fiscal year ended June 30, 1915, the ports of St. Albans, Swanton, and Highgate in customs collection district No. 2 (Vermont), are hereby abolished, effective December 1, 1923.

By virtue of the same authority a new port of entry is hereby established which shall be known as the port of St. Albans, the headquarters port of customs collection district No. 2 (Vermont), and which shall comprise the townships of St. Albans, Swanton, Highgate, and Franklin, effective December 1, 1923.

CALVIN COOLIDGE.

The White House, November 13, 1923.

McKenzie Moss, Assistant Secretary."

APPENDIX.

CUSTOMS REGULATIONS, 1923.

ART. 395. EXAMINATION—COLLECTION OF DUTIES.—Personal and household effects not intended for sale, if accompanying a passenger, may be examined and passed on the pier regardless of value. No consular invoice is required. Merchandise, that is, articles not of a personal nature, or which are intended for sale, or were bought on commissions for others—valued at over $100 but less than $500, may be examined and appraised on the pier, if accompanied by a consular invoice. If not accompanied by a consular invoice, regular entry at the custom house and appraisement will be required. If the value of such merchandise exceeds $500, regular entry and appraisement must be made whether or not accompanied by a consular invoice.

Personal and household effects, including articles acquired abroad by returning residents, may be passed by inspectors without calling an examiner. If an inspector is in doubt as to character of articles, an examiner should be consulted.

Duties will be assessed on articles in passengers' baggage on the actual market value of such articles due allowance being made for depreciation through wear and use.

Collectors have discretionary power to remit duties not exceeding $2 on articles in passengers' baggage.

Receipts for duties on articles in passengers' baggage shall be given to the payor on Customs Form 6063 at comptroller ports, and at subcomptroller ports on Customs Form 5119.

Customs officers will not open baggage for the purpose of examination. Any baggage which is not opened by the owner or his agent for examination should be treated as unclaimed.

Commercial travelers' samples imported under the reciprocal agreement between this country and the United Kingdom of Great Britain and Ireland may be passed upon the dock in the same manner as passengers' baggage without formal entry, provided such samples are not valued at more than $500 and are accompanied by a descriptive list certified by an American consul. The descriptive list will be attached to the declaration and duties deposited or bond given for exportation.

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,	
Petitioner	October Term 1938
v.	No. 669.
Leib Ritterman.	

SUPPLEMENTAL BRIEF FOR RESPONDENT.

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,	)	
Petitioner	)	October Term 1926
v.	)	
Leib Pitterman.	)	No. 668.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

On pages 11 and 12 of respondent's brief reference is made to the reason which may have actuated Congress to change Section 3865 of the Revised Statutes by eliminating the words, "subject and duty" and "without paying and accounting for duty" from Section 593 (a) of the Tariff Act of 1922. It is the intention to state in this memorandum alternative reasons which may have actuated Congress to so do and to press the reason hereinafter set forth, rather than limit the discussion to the reasoning set forth in those pages of respondent's brief.

Page 11 of the respondent's brief should have included, after the italicized words at the end of the second paragraph the following:

"provided the words 'defraud the revenue' mean more than pecuniary loss."

Section 593 a contains four elements of the crime commonly described as smuggling; that is:

(1) Defraud the revenue

(2) Smuggle or clandestinely introduce

(3) Merchandise

(4) Which should have been invoiced;

while Section 2865 of the Revised Statutes under which Keck vs the United States was decided contained six elements of the crime of smuggling.

It is respondent's contention that the four elements in Section 593 a include all of the six elements set forth in Section 2865 of the Revised Statutes. If the congressional intent is to be judged from the law applicable from the decisions defining of these four elements.

"Defraud the Revenue" in the light of Haas vs Henkle 216 US 462, 479 (defining "defraud the United States") might have meant any interference with a governmental function and was not necessarily limited to the causing of pecuniary loss; but this Court 70 L Ed 249 in the United States vs Cohn, October Term, 1925, Case No. 130, held that the context of the statute containing the word "defraud" should be the determining factor in attaching to the word "defraud" its proper meaning. This doctrine, if carried to

its logical conclusion, would mean that "defraud and revenue" is confined to the causing of pecuniary loss to the Government by some act of deceit or chicanery. (See Peoples U.S. Bank Vs Goodwin 162 Federal 937; United States vs Norton 16 of Wallace 566, both of which define "revenue" in the words of Webster as: "The income of a nation derived from taxes, duties and other sources for the payment of national expenses." See also Encyclopaedia Britannica, 1911 edition, volume 33, page 323, defining revenue as "Income return or profit, more particularly the receipts from all sources of a government or state."

It may thus be concluded that there could be no defrauding of the revenue under 593 (a) unless it was such defrauding as caused pecuniary loss. Consequently, the only defrauding of the revenue which can occur by the introduction of merchandise in violation of law would be the loss of the duty, and a loss of duty presupposes the existence of a duty to which the goods are subject.

"Smuggled or clandestinely introduced" was defined in the case of Keck vs United States to be "The overt act of passing the goods through the lines of the customs authorities without paying or securing the duties" and this interpretation of the law was so stated in 24 opinions of the Attorney General, page 583 at 586.

F. 586

It is not necessary to dwell on the technical meaning of the word "importation" which is satisfied by arrival within the limits of a port of entry with intent to unlade. The ultimate purpose of all such prohibitions of importations is to prevent the actual introduction of the goods into the country, and the offense of smuggling is not complete, as we have seen, until the merchandise has been landed: that is, has actually crossed the line of the customs authorities. This clandestine introduction is prohibited by the gravest penal sanctions (SECS. 2865, 3082, R. S.)

It will thus be seen that the word "smuggle" or its interchangable expression, "clandestinely introduce", means the secret introduction of goods construed with an evasion of an obligation to pay the duty, and that such definition is complete without the words of Section 2865, "subject to duty or without paying or accounting for the duty" is apparent.

"Merchandise" was decided in the case of the United States vs Sischo, 262 US 165, to include prohibited merchandise. Consequently, no additional phraseology or omission of existing phraseology was necessary to indlude such prohibited merchandise within the terms of Section 593 a.

Further, Section 401 of the Tariff Act of 1922, par. "e", defines merchandise for the purposes of the Act as "goods, wares and chattels of every description and includes merchandise the importation of which is prohibited".

Free merchandise was not covered by Section 2865 of the Revised Statutes nor is it covered by Section 593 a of the Tariff Act of 1922, because of the obvious paradox in charging the smuggling free goods with an intent to defraud the revenue.

"Smuggle or clandestinely introduce" merchandise with intent to defraud the revenue includes, therefore, every case of articles covered by Section 2865 of the Revised Statutes, and in addition thereto, prohibited articles; and this renders unnecessary the inclusion of the words "subject to duty and without paying and accounting for the duty" as all articles which might be covered by these two clauses are already covered by the Statute 593 a as enacted.

This renders the doctrine of the Heck case applicable because the statutes are the same and the indictments in the two cases were the same and the facts in the two cases, up to a certain point, are identical.

The arrival of the steamship at the dock, in the Heck case, and the arrival of the international train at the station of St. Albans, Vermont, create identical legal situa-

tions. The limit of the territorial waters in the Keck case is identical with the international boundary line between Canada and the United States in the case at bar.

No machinery exists for the making of entry and the collection of duties on the ship approaching the dock and no legal machinery exists for the making of an entry and the paying of the duty on a train approaching the first point of entry in the United States-- which, in the case at bar, was St. Albans, Vermont.

The provisions of the Tariff Act of 1922; such as Sections 431 and 481 covering manifests, 481 to 498 inclusive dealing with entries, bills of lading, consular invoices, etc., and Section 499 and the sections dealing with examination and appraisal; all deal with merchandise in the ordinary meaning of the term and do not apply to baggage. (See United States vs Peral Necklace 111, Federal 165; United States vs One Purple Cloth Costume, 158 Federal 899; and United States vs One Pearl Chain, 139 Federal 510, affd. 513.)

If it be decided that articles in the baggage are to be treated the same as merchandise then they must be given the benefit of the merchandise provisions for entry and Section 484 of the Tariff Act of 1922, which provides that merchandise shall be entered "within 48 hours**** after the entry of the importing vessel or report of the vehicle",

no such period of time was granted to respondent. The merchandise or baggage, which ever it may be, was seized from the vehicle upon which it had arrived prior to the giving of any legal opportunity to respondent to make any kind of an entry.

If the diamonds be considered as articles in the baggage then Section 461, Section 482, Section 498 of the Tarrif Act of 1922 and Articles 205, 247 and 395 of the Customs regulations of 1923 control this transaction from its inception to its end; and nothing which happened, either in Canada or on the train where respondent was led to believe the invitation to declare included only articles on his person or in his small handbag which then accompanied him, or at the custom house at St. Albans, prior to the time when he was asked about his Gladstone bag, could be held to be any more than an attempt, unaccompanied by the overt act which, perhaps, respondent was prevented from committing by the illegal act of the customs authorities in seizing his bag before it had been landed within the customs lines at St. Albans.

A compliance with the law would not permit baggage to get out of the control of the customs authorities between Montreal and the first port of entry in the United States and it certainly did not get out of their control in the case at bar. These diamonds were not <u>discovered</u> by the customs

authorities. They were disclosed by the passenger during the course of his entry and before his examination was concluded.

The passengers baggage regulations having to do with passengers arriving on steamships and referred to above contemplate the giving to the passenger of a blank declaration and are as follows:

SECTION 496, TARIFF ACT OF 1922:

"EXAMINATION OF BAGGAGE" - The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefore has been made."

SECTION 497, TARIFF ACT OF 1922:

"FORFEITURE" - Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article".

CUSTOMS REGULATIONS, 1923:

"ART. 390. "DECLARATIONS AND ENTRIES. - Forms of baggage declaration and entry, Customs Form 6063, will be furnished by collectors to steamship companies for use on steamships carrying first and second class passengers, Customs Form 6061, will also be furnished for distribution on steamers.

Passengers should prepare and sign their declarations on board steamships at least one day before arrival and should hand them to the purser for delivery to the proper customs officer on arrival in port.

Failure to declare dutiable articles contained in baggage before examination of the baggage is begun subjects such articles to seizure and forfeiture and the passenger to a penalty equal to the value of such articles. When the collector is satisfied that the failure to declare any article was not with intent to evade the payment of duty he may permit the declaration to be amended.

The senior member of a family, if a passenger, may declare for the entire family, including servants traveling with them."

ARTICLE 392.

"PROCEDURE ON DOCK. - After the baggage has been landed and declaration signed and acknowledged before

a customs officer it will be examined by a customs inspector and released upon the payment of such duties as may be found due. The examination of any baggage may be postponed and the baggage sent to the appraisers' stores or in bond to another port at the request of the passenger.

When all or any part of the passenger's baggage is detained for further examination a receipt therefor will be given on Customs Form 6051."

These regulations, however, do not apply to the introduction of baggage or articles therein or articles contained on the person arriving from contiguous territory.

Section 498 of the Tariff Act of 1932 has recognized the distinction between personal effects and articles carried on the person or contained in the baggage or persons arriving in the United States. Sub-section 4 of that section provides for household effects used abroad and personal effects, not imported in pursuance of a purchase or agreement for purchase and not intended for sale.

Sub-section 6 of that section provides for articles carried on the person or contained in the baggage of a person arriving in the United States.

This differentiation has been followed in Article 347 of the Treasury Regulations 1933, promulgated there-

under. In Section D. sub-section 4 of Article 347, it is provided it is provided for household effect used abroad and personal effects not imported in pursuance of a purchase or agreement for purchase and not intended for sale; and sub-section 6 provides for articles carried on the person or contained in the baggage of a person arriving in the United States.

The Government form set forth in the Appendix of the Government's brief refers specifically to sub-section 4 as mentioned in the above provisions of the Tariff Act and also to sub-section 4 of article 347.

Obviously, therefore, it is not intended that consular invoices should be required for articles carried on the person or in the baggage, as they are specifically exempted under Section 6, and as the form referred to by the Government applies only to personal effects it is not therefore improbable or unreasonalbe to assume that Congress had provided for the different method importation and examination in the goods of the class at bar carried in the baggage of passengers and subject to the scrutiny of government officers.

Moreover, no blank declaration on any customs form was given to respondent nor even mentioned to him.

hat might have happened had this baggage gone through without any suspicion or knowledge of the presence of dutiable merchandise or seizure by the customs authorities is beside the point. We are here concerned with a set of facts for which respondent was indicted under a criminal statute and the question is what actually happened, not what might have happened. Whatever bearing that might have had on respondent's intent, we contend that what he actually did constituted only an attempt to smuggle not accompanied by the commission of the overt act necessary to constitute the crime set forth in Section 593 a. As the Circuit Court of Appeals said (R. 79), whatever may have been respondent's responsibility under other statutes is not before us.

Respectfully submitted.

Albert Sidney Burnett, Jr.,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 669.—October Term, 1926.

The United States of America, Petitioner, vs. Leib Ritterman.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 21, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

The respondent was indicted for smuggling and clandestinely introducing into the United States from Canada, merchandise, viz., 1022.85 carats of unset cut diamonds, without making any declaration to enter the same and without causing them to be invoiced for the purpose of ascertaining the duties upon them and without paying or accounting for the duties to which they were subject, although he had an opportunity to do so, with intent to evade payment of such duties. He was convicted in the District Court but the judgment was reversed by the Circuit Court of Appeals. 12 F. (2d) 849. A writ of certiorari was granted by this Court under the Act of February 13, 1925, c. 229, amending § 240(a) of the Judicial Code. 43 Stat. 936, 938.

On January 28, 1926, the respondent bought a ticket in Montreal for New York and sought to have a Gladstone bag that he carried checked through to New York. A customs inspector sent there by the United States for the convenience of travellers asked him about the contents and he answered 'Just my own personal wearing apparel.' Such examination as the inspector made disclosed nothing but clothing and personal effects. The inspector thereupon tied and sealed the bag and attached the requisite manifest. In the ordinary course of events the strings would have been cut after crossing the boundary line and the bag would have gone on to New York and then would have been delivered to the owner without more. Some suspicion was felt however and the respondent was again questioned after

entering the United States and repeated that he had nothing to declare. On the train's arrival at St. Albans, Vermont, which is the port of entry, he was called into the custom house and there again stated that he had nothing, and more specifically, no diamonds, to declare, and on the suggestion that he had a quantity in his possession the day before, in Montreal, said that he had but placed them in a bank there, named. An examination of his person was begun and while he was removing his clothes he was asked for the key to the Gladstone bag and handed it over. The respondent continued undressing but before finishing said to the assistant collector, "I haven't any diamonds on my person; they are in my grip." Within a few minutes officers who had been examining the bag in another room reported that diamonds had been found hidden there. They were of the amount alleged, were valued at $122,492.43, United States valuation, and were subject to a duty of twenty per cent. Act of 1922, c. 356, Title I, Schedule 14, Par. 1429, 42 Stat. at L. 917. It does not appear that the discovery was brought about by the confession. It seems to have been the result of search alone.

The Tariff Act of 1922, c. 356, § 593 (a), 42 Stat. 858, 982, is as follows:

"Smuggling and clandestine importations. (a) If any person knowingly and willfully with intent to defraud the revenue of the United States smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, every such person, his aids, abettors and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

The Judge gave the following instructions to the jury:

"If you find that the defendant falsely and fraudulently intending to defraud the revenue of the United States told Collector Whitehill and Assistant Collector Walsh at the customs house that he did not have any diamonds to declare, this constituted the offense of smuggling, notwithstanding that later, while his person was being searched by Assistant Collector Walsh at the customs house, he admitted that he had some diamonds in his Gladstone bag.

"If the defendant intended to smuggle the merchandise in question, he had an opportunity to change his mind up to the time when the obligation to pay or account for duties arose, and if you

believe that the defendant did so change his mind and did so declare then it is your duty to find him not guilty.

"If you find as a fact that the defendant had no opportunity to declare the Gladstone bag because it was seized or taken from him, and that his first opportunity to declare the diamonds came at the time when he was asked for the key and before his examination was completed, if you believe that he then availed himself of this opportunity then your verdict should be not guilty."

The first paragraph of the charge was excepted to and was held erroneous by the Circuit Court of Appeals. It was held that the respondent could not be convicted under § 593. *Keck* v. *United States*, 172 U. S. 434, was taken to establish that smuggling could not be committed before the moment when the obligation to pay arose, that is, after the duty was established at the custom house. *Keck* v. *United States* did not decide that a man who wishes to smuggle must wait until he can find a custom house. Its effect is simply that the customs line is not passed by goods at sea when they pass the three-mile limit and have not yet been landed. The statute then in force (R. S. § 2865) after the words 'which should have been invoiced' added 'without paying or accounting for the duty.' The omission of the later words is explained in different ways by the two sides, but for the purposes of this decision we treat it as immaterial. Here diamonds were clandestinely introduced upon the soil of the United States, and although they would pass a point at which they ought to be examined, they would not have been, but on the contrary would have been secure from further inspection had the trick succeeded. If they had been carried across the boundary in such a way as to avoid a port of entry, we suppose that the offence of smuggling would have been complete when they passed the line, although the smuggler might repent and afterwards report for payment of duties. We perceive no difference because of the accident that the goods had to pass a custom house which the respondent's fraud had deprived of further function if it had not been found out.

It does not appear to us to need argument that the diamonds were 'merchandise which should have been invoiced' and appeared to be such on the face of the indictment. The respondent could not get rid of the duty by hiding them in his stockings and other personal luggage. He could not purge himself of the consequences of his fraud by confessing when he saw that he was on the point

of being discovered or, as might have been found, after he had been. The argument that in such circumstances he was entitled to forty-eight hours, § 484(a), or any time to change his mind and make entry of the goods, seems to us extravagant. Repentance came too late.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.